

No. 87-1661-CSX Title: ASARCO Incorporated, et al., Petitioners
 Status: GRANTED v.
 Frank Kadish, et ux., et al.

Docketed: Court: Supreme Court of Arizona
 April 8, 1988 Counsel for petitioner: Gribbon, Daniel M.
 Counsel for respondent: Baron, David S.

February 2, 1988: Reconsideration denied by Arizona Supreme Court (re: attorney's fees)

Entry	Date	Note	Proceedings and Orders
1	Feb 23 1988		Application for extension of time to file petition and order granting same until April 8, 1988 (O'Connor, February 25, 1988).
2	Apr 8 1988 G		Petition for writ of certiorari filed.
4	Apr 27 1988		Order extending time to file response to petition until May 25, 1988.
5	May 24 1988		Brief of respondents Frank Kadish, et al. in opposition filed.
6	May 24 1988 G		Motion of Alaska Miners Association, et al. for leave to file a brief as amici curiae filed.
7	May 25 1988 G		Motion of Clinton Campbell Contractor, Inc. for leave to file a brief as amicus curiae filed.
8	May 31 1988 X		Reply brief of petitioners ASARCO INC., et al. filed.
9	May 31 1988		DISTRIBUTED. June 16, 1988
10	Jun 7 1988 X		Brief of respondents Frank Kadish, et al. in opposition to motions of Phoenix BrickYard and AK Miners Assn. for leave to file briefs amicus curiae filed.
11	Jun 20 1988 P		The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice O'Connor OUT.
12	Aug 3 1988		Supplemental brief of respondents Frank Kadish, et ux. filed.
13	Sep 7 1988		Brief amicus curiae of United States filed.
14	Sep 14 1988		REDISTRIBUTED. October 7, 1988
15	Sep 20 1988 X		Supplemental brief of petitioners ASARCO INC., et al. filed.
16	Oct 11 1988		Motion of Alaska Miners Association, et al. for leave to file a brief as amici curiae GRANTED. Justice O'Connor OUT.
17	Oct 11 1988		Motion of Clinton Campbell Contractor, Inc. for leave to file a brief as amicus curiae GRANTED.
18	Oct 11 1988		Petition GRANTED. Justice O'Connor OUT.
19	Nov 23 1988 G		***** Motion of Alaska Miners Association, et al. for leave to file a brief as amici curiae filed.
20	Nov 23 1988		Brief of petitioners ASARCO INC., et al. filed.
21	Nov 23 1988		Joint appendix filed.
23	Nov 25 1988 G		Motion of Clinton Campbell Contractor, Inc. for leave to file a brief as amicus curiae filed.
22	Nov 30 1988	*	Record filed.
		* Certified copy of original record received.	

Entry	Date	Note	Proceedings and Orders
24	Dec 5 1988		Motion of Alaska Miners Association, et al. for leave to file a brief as amici curiae GRANTED. Justice O'Connor OUT.
29	Dec 9 1988 G		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
25	Dec 12 1988		Motion of Clinton Campbell Contractor, Inc. for leave to file a brief as amicus curiae GRANTED. Justice Brennan and Justice O'Connor OUT.
27	Dec 16 1988		Order extending time to file brief of respondent on the merits until January 14, 1989.
28	Jan 6 1989		SET FOR ARGUMENT MONDAY, FEBRUARY 27, 1989. (3RD CASE.)
32	Jan 12 1989		Brief amici curiae of California, et al. filed.
30	Jan 13 1989		Brief amicus curiae of Arizona filed.
31	Jan 13 1989		Brief of respondents Frank Kadish, et al. filed.
33	Jan 13 1989		Brief amicus curiae of United States filed.
34	Jan 23 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice O'Connor OUT.
35	Jan 24 1989		CIRCULATED.
36	Feb 13 1989 X	Reply brief of petitioners ASARCO INC., et al. filed.	
37	Feb 27 1989		ARGUED.

87-1661 (1)

No. 87-

Supreme Court, U.S.

FILED

APR 8 1988

JOSEPH F. SPANGLER,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA
COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA**

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April 8, 1988

QUESTION PRESENTED

A federal statute, the Jones Act of 1927, which prohibits the sale of mineral lands granted by the federal government to the western states, empowers the states to lease mineral lands "as the State legislature may direct" so long as the proceeds are used for the support of public schools. For almost fifty years Arizona, in reliance on the Jones Act and a cognate amendment of the New Mexico-Arizona Enabling Act of 1910, has leased its mineral lands pursuant to a state statute providing for a uniform 5 percent royalty on the value of the minerals extracted.

The question is whether, as the Supreme Court of Arizona has held, Arizona's royalty statute is void, despite the broad power over mineral leasing granted to the state legislature, by reason of provisions of the original Enabling Act of 1910 granting only nonmineral lands, which require appraisal, public auction, and disposition at no less than the appraised value of lands granted by the act.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Arizona, whose judgment is sought to be reviewed, were Frank and Lorain Kadish, Marion L. Pickens, and the Arizona Education Association, plaintiff-appellants; the Arizona State Land Department, an agency of the State of Arizona, Joe T. Fallini, in his capacity as the State Land Commissioner (since succeeded by M. Jean Hassell), and Cyprus Pima Mining Company, on behalf of itself and others similarly situated, defendant-appellees; ASARCO Incorporated, Magma Copper Company, James P.L. Sullivan, Eisenhower Mining Company, Can-Am Corporation, intervenor-appellees; and the New Mexico Commissioner of Public Lands, *amicus curiae*. The parties joining in this petition are ASARCO Incorporated, Can-Am Corporation, Magma Copper Company, and James P.L. Sullivan.

LISTINGS REQUIRED BY RULE 28.1

ASARCO Incorporated does not have a parent company. Its subsidiaries and affiliates (other than wholly owned subsidiaries) are:

- Alta Mining and Development Company (Utah)
- Asarco Australia Limited (Australia)
- Blackhawk Mining and Developing Company, Limited (Idaho)
- Copper Basin Railway, Inc. (Delaware)
- Federated Genco Limited (Canada)
- Fry's Metals, Inc. (Delaware)
- Geominerals, Ltd. (Bermuda)
- Government Gulch Mining Company, Limited (Idaho)
- Green Hill Cleveland Mining Company (Nevada)
- LAB Chrysotile Inc. (Canada)
- Liard River Mining Company Ltd. (N.P.L.) (Canada)
- Mexico Desarrollo Industrial Minero, S.A. (Mexico)
- M.I.M. Holdings Limited (Australia)
- Lesareco, Inc. (Philippines)
- Neptune Mining Company (Delaware)
- Corporacion Minera Nor Peru, S.A. (Peru)
- Southern Peru Copper Corporation (Delaware)
- Wyoming Mining and Milling Company, Limited (Idaho).

The parent of Can-Am Corporation is Chemstar, Inc. Can-Am Corporation does not have any subsidiaries or affiliates.

Magma Copper Company does not have any subsidiaries, except wholly owned subsidiaries. It is approximately 15 percent owned by Newmont Mining Corp. and approximately 17 percent owned by Gold Fields American Corp., each of which has numerous subsidiaries and affiliates that this petitioner has not undertaken to list in this petition.

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IN THE
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OCTOBER TERM, 1987

No. 87-

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA
COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA**

Petitioners pray for a writ of certiorari to review a decision of the Supreme Court of Arizona.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 747 P.2d 1183 and is set forth in Appendix A, pp. 1a-36a, below. The opinion of the trial court, the Superior Court of Maricopa County, is unreported and is set forth in Appendix B, pp. 37a-39a, below.

JURISDICTION

The final judgment of the Supreme Court of Arizona was entered on December 10, 1987. Under Arizona practice, the filing of the opinion of the Supreme Court of

Arizona constitutes entry of the judgment. Respondents filed a timely motion for reconsideration of their claim against the state defendants on the issue of attorney's fees, which would not have altered the judgment with respect to these petitioners. The motion was denied on February 2, 1988. (App. D., p. 44a, below.) On February 25, 1988, Justice O'Connor granted petitioners' protective application for an extension of time, to and including April 8, 1988, within which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The relevant statutes are the Jones Act of 1927, Pub. L. No. 570 (ch. 57), 44 Stat. 1026, codified as amended at 43 U.S.C. § 870, the New Mexico-Arizona Enabling Act of 1910, as amended, Pub. L. No. 219 (ch. 310), §§ 24, 28, 36 Stat. 557, 572, 574, and Ariz. Rev. Stat. Ann. § 27-234(B). They are reproduced in Appendix E, pp. 46a-53a, below.

STATEMENT

Relevant Federal Statutes. By Section 24 of the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219 (ch. 310) § 24, 36 Stat. 557, 572, Congress granted to the State of Arizona four sections of land in each township for the new state to use for the education of school children—a total of some eight million acres. At the time it was the longstanding practice of Congress to exclude mineral lands from its land grants, including grants to the states, and instead to reserve those properties exclusively to the federal government. Accordingly, the grant to Arizona in 1910 excluded mineral lands from the tracts granted. *See id.*; *United States v. Sweet*, 245 U.S. 563, 567-72 (1918).

Because some of the states admitted to the Union before Arizona and New Mexico had permitted the proceeds of their disposition of the lands granted to them

for the education of school children to be diverted to other uses, Congress in the Enabling Act of 1910 imposed restrictions on how Arizona (and New Mexico) could dispose of the nonmineral lands and surface assets that were granted to them by that act. *See H.R. Rep. No. 152, 61st Cong., 2d Sess. 3 (1910); see also 45 Cong. Rec. 8227 (1910)* (Sen. Beveridge). Section 28 of the 1910 Enabling Act (applicable to Arizona) declared that the lands granted to the state by Section 24 of the act "shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided." It prohibited the selling or leasing of the granted lands or their natural products except to the highest bidder at public auction after advertisement in a newspaper of general circulation. It also required all "lands, leaseholds, timber, and other products of land" to be appraised to determine their true value before they were offered for sale or lease and prohibited the state from selling or otherwise disposing of the granted tracts for less than the value so ascertained.

The exclusion of mineral lands from the lands granted to the western states generated considerable confusion with respect to title to lands found to contain mineral deposits after the grant to a state of nonmineral school lands had become effective. This Court ultimately ruled that, if land identified as state school land in the granting act was not known to be mineral at the time that the grant took effect, legal title passed to the state and was not defeated by a subsequent discovery of mineral deposits. *See, e.g., Wyoming v. United States*, 255 U.S. 489, 499-500 (1921).

Because factual questions persisted about when minerals were discovered, disputes continued as to whether the federal government or a state or its grantees held title to mineral lands in some eleven western states. Congress in 1927, therefore, enacted a statute that extended school land grants to the states to include lands

mineral in character. Pub. L. No. 570 (ch. 57), 44 Stat. 1026, as amended, 43 U.S.C. § 870. This act, known as the Jones Act of 1927, did not amend the New Mexico-Arizona Enabling Act of 1910 or any other state's enabling act. It granted to all of the school land-grant states the full title to the school sections specified in their respective enabling acts that were mineral in character. It prohibited the states from selling the minerals on the newly granted lands but expressly authorized each state to lease the mineral deposits "as the State legislature may direct," provided only that "the proceeds of rentals and royalties" from the leases were used in support of the state's public schools.

In 1936 Congress amended Section 28 of the New Mexico-Arizona Enabling Act by inserting a provision that "nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands referred to in this section" for, among other purposes, "mineral" purposes for up to twenty years. Pub. L. No. 658 (ch. 517), 49 Stat. 1477-78 (1936). In 1951 Congress again amended Section 28 of the Enabling Act of 1910 to provide that the authority of the state legislature to lease lands for mineral purposes "in such manner as [it] may prescribe" was not affected by the fact that the lands might also be leased for grazing and agricultural purposes. This amendment also authorized oil and gas leases of indefinite duration without prior appraisal or public auction. Pub. L. No. 44 (ch. 120), 65 Stat. 51, 52 (1951).

Arizona's Mineral Leasing Program. In 1941 the Arizona legislature established the leasing regime that continues to govern all non-hydrocarbon mineral leases of state lands, including public school lands and others. The locator of mineral deposits is granted certain preferred rights to obtain a mineral lease from the state if it undertakes the exploration and developmental drilling necessary for mineral extraction. Ariz. Rev. Stat. Ann.

§§ 27-233, 27-254. Payments to the state for mineral leases are set at a uniform royalty rate of 5 percent of the net value of the minerals extracted from the state land in addition to a nominal annual rental. *Id.* § 27-234(A), (B). Mineral leases are for a maximum of twenty years. *Id.* § 27-235(A). Arizona has never required that payments to the state under mineral leases of state land be determined by a prior appraisal of the site and public bidding or that lease payments reflect the appraised value.

Petitioners hold mineral leases from the State of Arizona both on lands expressly granted to the state by the Jones Act of 1927 and on lands that were part of the 1910 grant in the Enabling Act and were subsequently found to contain mineral deposits and were held by this Court in *Wyoming v. United States*, 255 U.S. 489 (1921), to pass to the state by the original grant. During the fiscal year 1986-87, a total of \$4,196,252 in mineral rentals and royalties was paid to the State of Arizona by lessees of state mineral lands, including petitioners and the class they represented below. Arizona State Land Department, *Annual Report* 34 (1987).

Proceedings Below. Respondents, a nonprofit education association and several taxpayers in Arizona, initiated this action in 1981 in the Superior Court of Maricopa County. They alleged that the Arizona statute authorizing a uniform royalty rate on minerals extracted from leased state lands was repugnant to Section 28 of the New Mexico-Arizona Enabling Act of 1910, as amended, and to article 10, section 4, of the Arizona Constitution, which is a rescript of Section 28 of the Enabling Act required by Congress to be included in the state's constitution. They asserted that, under Section 28 and the corresponding provision of the state constitution, mineral leases may be made only if each individual leased site is appraised before leasing, the leasing rights are auctioned, and payments under a lease are set

at no less than the value ascertained by such an appraisal. The trial court allowed petitioners to intervene as intervenor-defendants, and a defendant class of parties was certified by the trial court as consisting of those holding or likely to hold mineral leases on state lands received from the federal government.

The trial court granted petitioners' motion for summary judgment on the ground that the challenged Arizona leasing statute does not violate the Arizona Enabling Act, as amended, or its rescript in the Arizona Constitution. On appeal the federal claim was appropriately preserved and the case was transferred from the court of appeals directly to the Supreme Court of Arizona because of the substantial importance of the issues presented. (P. 3a, below.) In a split decision, that court reversed and held that the Enabling Act of 1910 invalidates the state statute.

The Supreme Court of Arizona concluded that language in the Jones Act of 1927 stating that the grant of mineral lands to the western states "shall be of the same effect as prior grants" implicitly incorporated all of the restrictions on the use and disposition of school lands that the Enabling Act had imposed on the state with respect to nonmineral lands and surface assets. (P. 9a, below.) In addition, in the court's view, the "dramatic revisions" of the 1951 amendments to the Enabling Act "greatly reinforce[d]" that conclusion because they showed that Congress in 1951 did not believe that the Jones Act of 1927 had passed mineral lands to the states free of the conditions that govern lands granted by the state's enabling act. (P. 18a, below.) Finally, the court found "fully dispositive" of the mineral leases involved in this case language in this Court's decision in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), which states that the leasing of agricultural lands granted to the State of Arizona by the Enabling Act of 1910 is subject to prior appraisal and to disposition at no less

than the appraised value under Section 28 of that act. (P. 22a, below.)

The Supreme Court of Arizona declared the Arizona royalty statute "void" as repugnant to Section 28 of the 1910 Enabling Act and its rescript in article 10 of the Arizona Constitution¹ and remanded the case to the trial court to enter judgment and determine the proper relief. (Pp. 27a, 29a, below.)

Justice Cameron dissented on the ground that Congress "in plain words" had authorized Arizona to lease state mineral lands in such a manner as its legislature might direct in both the Jones Act of 1927 and the 1936 and 1951 amendments to the Enabling Act of 1910. The dissenting Justice noted that, "[b]ecause mineral lands were reserved to the federal government under the Enabling Act, Congress could not have contemplated their inclusion" in the restrictions on the state's leasing of nonmineral lands and surface assets in Section 28 of the Enabling Act of 1910. He further observed that subsequent legislative events showed congressional affirmation of the states' sole authority over the leasing of school lands that contain mineral deposits. (P. 32a & n.2, below.) He also noted the considerable practical difficulties of imposing a prior appraisal and auction regime on mineral deposits, which are "almost impossible to value until after extensive and often expensive exploration." (P. 35a, below.)

¹ The Enabling Act of 1910 requires that the terms and conditions imposed on Arizona with respect to school lands shall be incorporated in the state's constitution and may not be abrogated without the consent of Congress. Pub. L. No. 219 (ch. 310) § 20, 36 Stat. 569, 570-71. Accordingly, the terms of Section 28 of the Enabling Act of 1910 are rescripted in article 10 of the Constitution of the State of Arizona. The court's ruling below relied exclusively on its interpretation of the federal Enabling Act and the Jones Act and not on any independent and adequate state ground. See pp. 4a-24a, below; *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

REASONS FOR GRANTING THE WRIT

The court below, in declaring void a course of action followed by Arizona for almost fifty years in realizing on the value of the mineral deposits in its lands, has decided a federal question of substantial importance not only to Arizona but to other western states. It has decided the question in a way that subordinates Arizona's sovereign choice of how to manage its resources and support its schools to a supposed federal policy derived from sources that are, at best, uncertain and ambiguous. The decision of the Arizona Supreme Court on the question is in conflict with a decision of the Supreme Court of Utah. The issue of federal-state relations raised by the two decisions has not been, but should be, settled by this Court.

1. In *Jensen v. Dinehart*, 645 P.2d 32, 35 (Utah 1982), the Supreme Court of Utah held that, insofar as mineral leasing is concerned, the purpose of the Jones Act of 1927 was to "free[] . . . federally granted school sections . . . from any restriction or limitation that may have theretofore existed, except as to use for public schools." The question in that case was whether the proceeds of mineral leases of school lands had to go into a perpetual school fund with interest only used currently, as the Utah Enabling Act required with respect to lands it granted to the new state; or, as the Jones Act of 1927 permits, the proceeds themselves could be used currently for school purposes. In deciding that the Jones Act provisions governed, the Supreme Court of Utah reasoned that Congress had not intended to convey mineral lands to Utah by the enabling act. Those lands were conveyed by the Jones Act, which left Utah "[a]s a sovereign state . . . free and unfettered" to manage its mineral leasing program for the support of its public schools unencumbered by the highly restrictive provision of the enabling act that governed proceeds from non-mineral school lands and surface assets. That was true

even though title to some mineral lands had passed to the state inadvertently under the state's enabling act when the mineral nature of the land was unknown at the time title vested. 645 P.2d at 35. Therefore, the proceeds from state mineral leases could be deposited into the state's currently expendable school fund and need not go into the state's perpetual school fund.

The precise question in the Utah case was different, but the governing issue was the same as that decided by the court below in this case: whether provisions in the individual states' enabling acts, which implicitly or explicitly excepted mineral lands from the grants of school lands, limit the leasing of mineral lands. The decision of the court of last resort of the State of Utah is in conflict with the decision of the court below on that issue.

2. The decision of the court below creates uncertainties in the management of state lands in other western states. The Jones Act of 1927 granted mineral lands principally to eleven western states: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming. See S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926). The enabling acts for those states contain various restrictions on the states' use and disposition of nonmineral school lands.² If followed by other courts, the holding that the Jones Act implicitly imposes those restrictions on a state's leases of its mineral lands could have an unsettling effect on state leasing systems in those states that since 1927 have looked to the Jones Act rather than their enabling acts as the source of their mineral leasing authority.

In Arizona alone the decision of the court below affects vast amounts of mineral lands that have been developed

² E.g., Pub. L. No. 199 (ch. 656) § 5, 26 Stat. 215, 216 (1890) (Idaho); Pub. L. No. 52 (ch. 180) § 11, 25 Stat. 676, 679-80 (1889) (amended 1932, 1948) (Montana and Washington).

or are now being explored under leases issued to private companies pursuant to the voided state statute. Because much of the land in Arizona is arid, Congress granted to Arizona four sections of land in each township instead of the one or two sections that it had given to many of the earlier public-land states, *see* 68 Cong. Rec. 1824 (1927), and as a result about one tenth of Arizona's acreage is state-owned school land and a significant amount is mineral in character. Mining companies have made sizeable investments in the exploration and development of those state mineral lands under the state mineral leasing statute passed almost fifty years ago. During that time the United States has never contested Arizona's manner of leasing its mineral lands even though the Attorney General of the United States is specifically authorized to enforce the land-grant terms of both the Enabling Act of 1910, § 28, 36 Stat. 574, 575, and the Jones Act of 1927, 44 Stat. 1026, 1027. The erroneous view of those laws espoused by the Supreme Court of Arizona upsets years of settled private expectations and unravels longstanding state policy with respect to vast quantities of state-owned lands in Arizona.

3. The decision of the court below curtailing the power of the State of Arizona to manage its own mineral lands for the benefit of its schools is not warranted by the relevant acts of Congress. The Jones Act, the only express grant of mineral lands to Arizona (and the other western states), expressly permits the state to lease mineral deposits "as the State legislature may direct," provided only that the "proceeds of rentals and royalties" from such leases are used to support the state's public schools and that the mineral deposits are reserved to state ownership. Pub. L. No. 570 (ch. 57), 44 Stat. 1026-27 (1927).

The Arizona Supreme Court's strained construction of the Jones Act as incorporating all of the original

Enabling Act's appraisal, fair-value and auction restrictions and making them applicable to mineral leases rests on Congress' prescription in the Jones Act that "[t]he grant of numbered mineral sections under this [Act] shall be of the same effect as prior grants" of nonmineral sections. 43 U.S.C. § 870. But that is clearly a reference to the nature of the actual grant of land—that is, the type of property interests conveyed to the state. If more had been intended, Congress would not have needed to specify as it did in the Jones Act that the proceeds of mineral leases must be "utilized for the support or in aid of the common or public schools." Every relevant enabling act was already to that "same effect."

The Utah Supreme Court held that the provisions of the Jones Act governed both lands withheld from Utah because they were known to be mineral at the time of the statehood grant and mineral lands that, under *Wyoming v. United States*, 255 U.S. 489 (1921), passed inadvertently, their mineral content undiscovered at the time of that grant. In the case of Arizona, it does not matter whether the Jones Act covers the latter category of mineral lands. The Arizona provisions of the New Mexico-Arizona Enabling Act have been amended to accord with the Jones Act and to relieve mineral leases of the restrictive appraisal, fair-value, and auction requirements applicable to the disposition of lands granted by the original act.³

³ The same result was achieved for New Mexico by means of a joint resolution of Congress in 1928 that authorized an amendment of the constitution of New Mexico to allow leasing of state mineral lands "under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding and containing such terms and provisions, as may be provided by act of the [state] legislature," provided that the state used the rents and royalties from the mineral lands to support its public schools. Pub. Res. No. 7 (ch. 28), 45 Stat. 58 (1928). A 1922 decision of the New Mexico Supreme Court, *Neel v. Barker*, 204 P. 205 (N.M. 1922), had held that because the En-

In 1936, paragraph three of Section 28 of the Enabling Act was amended to allow Arizona to lease lands for mineral purposes for up to twenty years "in a manner as the State legislature may direct." Pub. L. No. 658 (ch. 517), 49 Stat. 1477-78. In 1951, the third paragraph was again rewritten, but to the same effect: "Nothing herein contained shall prevent . . . the leasing of any of [the lands referred to in this section], in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes . . . for a term of twenty years or less." Pub. L. No. 44 (ch. 120), 65 Stat. 51, 52. The "nothing herein contained" phrase of the 1951 amendment (also used in the 1936 amendment) encompasses all of the provisions of Section 28—including the requirement of sale or lease at no less than appraised value in the fourth paragraph as well as the advertising and bidding requirements of the third paragraph—because Section 28 is a unified whole without separately numbered paragraphs and because there are several instances in which Congress in Section 28 used the word "herein" indisputably to refer to materials in other paragraphs within that section. *See, e.g.*, Section 28, §§ 1 & 11.

abling Act of 1910 had not intended to grant mineral lands to the state, if any such lands passed to the state inadvertently, those lands were not subject to the Act's requirements of prior appraisal, public auction and sale at no less than the appraised value. The joint resolution of Congress approved of that view of the state's authority to lease mineral lands under the Enabling Act.

The New Mexico resolution related only to lands "granted or confirmed" by the Enabling Act of 1910 and did not contain any reference to the mineral lands that had been granted to the state by the Jones Act of the preceding year. The 1928 Congress apparently believed it self-evident that the state had wide latitude in the manner of leasing mineral lands granted to it by the Jones Act and that no such resolution was needed with respect to those lands. Its action was prompted only by lingering uncertainty about whether the Enabling Act's restrictions on leases applied to mineral lands that had passed inadvertently under the land grant of 1910. *See S. Rep. No. 90, 70th Cong., 1st Sess. 2-3 (1928).*

The legislative history of both the Jones Act and the amendments to the Enabling Act confirms that Congress recognized the distinct nature of mineral deposits as opposed to surface assets and that it intended to entrust the leasing of state mineral lands to state legislatures. Historically, it was the "practice of Congress to make a distinction between mineral lands and other lands, to deal with them along different lines." *United States v. Sweet*, 245 U.S. 563, 567 (1918). Because Congress did not mean to convey any mineral lands to Arizona when it passed the Enabling Act of 1910, it had no occasion at that time to consider what conditions, if any, on the state's disposition of mineral lands would be appropriate in order to foster desirable levels of exploration and mining investments and at the same time generate sufficient revenues for the state's public schools.

Congress did focus on this issue in 1927 and in the Jones Act made a specific new federal grant of mineral lands to the states. The history of the Jones Act shows that Congress did not intend the federally imposed disposition requirements of each grantee state's enabling act to govern the new grant of mineral lands. On the contrary, the view that prevailed in Congress was that each state should assume full control over the leasing of state mineral lands. Congressman Sinnott, chairman of the House Public Lands Committee, testified that "in these days the State legislatures can be depended upon to be just as zealous and just as jealous of the public school fund as the Federal Government can be." *Hearings on S. 564 Before the House Comm. on Rules*, 69th Cong., 2d Sess. 6 (1926), and Congressman Morrow of New Mexico similarly stated in debate that "[t]he placing of the mineral rights in charge of the States will bring to each State an immense school fund if each State will in turn use business judgment." 68 Cong. Rec. 1820 (1927). The Senate committee report accompanying the bill stated that all of the eastern states

held their lands outright without reservation, that Congress had given eight other states their minerals and that therefore placing mineral lands "in the hands of" the western states from whose school-land grants mineral lands had been excluded was necessary to put them on an "equal basis with the original States." S. Rep. No. 603, 69th Cong., 1st Sess. 6 (1926).

Congress saw practical reasons as well for not encumbering the grants of mineral-bearing lands with the restrictions applicable to other school lands. In discussing title problems that had arisen under the states' enabling acts, the Senate committee report noted that the mineral character of land often is unknown or purely speculative until "extensive and expensive exploration work has been carried on" or until "science has developed a new process making valuable a deposit which theretofore had no value." *Id.* at 5. Mineral extraction also poses special concerns about the proper balance of conservation and development, e.g., *Hearings, supra*, at 6, 9, 11, 16, 21 (1926), and those factors require a separate regulatory regime, which Congress expressly entrusted to state legislatures.

The subsequent amendments to the Enabling Act confirm the clear intent of Congress in 1927 to grant state legislatures the right to lease mineral lands free of the restrictions imposed upon the disposition of nonmineral lands. The Senate and House committee reports on the 1936 amendment to Section 28 authorizing Arizona to lease mineral lands for up to twenty years "in a manner as the State legislature may direct," referred to letters from the Department of the Interior as stating the reason for the amendment. Those letters observed that "[t]here is *no provision* in the Enabling Act for the development or protection of minerals" on school lands while the Jones Act, which had granted mineral lands to the state, permitted the state legislature to direct the manner of leasing mineral deposits. S. Rep. No. 1939,

74th Cong., 2d Sess. 2 (1936) (emphasis added). The letters concluded that the purpose of the amendment was to fill a void that may have existed within the Enabling Act with respect to mineral lands granted inadvertently under the Enabling Act by harmonizing that earlier act with the liberal mineral leasing regime of the Jones Act. *Id.* at 2-3. See also H.R. Rep. No. 2615, 74th Cong., 2d Sess. 2-3 (1936).

The purpose of the further 1951 amendment of the Enabling Act was to encourage large-scale development of oil and gas by permitting leases of indefinite duration. The amendment permitted leasing of oil and gas substances for up to twenty years "and as long thereafter" as hydrocarbons could be procured in paying quantities. Mineral leases continued to be limited to twenty years and, as we have seen, the language conferring on the Arizona legislature discretion in making such leases was slightly revised: leasing was authorized "in such manner as the Legislature of the State of Arizona may prescribe." Pub. L. No. 44 (ch. 120), 65 Stat. 51, 52 (1951).

The indefinite oil and gas leases that the 1951 amendment authorized could be regarded as sales instead of leases, and Congress expressly exempted such leases from any requirements of prior appraisal, advertising and public bidding. That difference in the treatment of hydrocarbons and other mineral deposits does not alter the fact that Congress intended to liberalize and not to constrain the powers of Arizona to lease school lands when it amended the Enabling Act in 1936 and 1951. Those amendments do not derogate from the discretion that the Jones Act of 1927 delegated to the state in the leasing of mineral lands. The Arizona Supreme Court was mistaken in viewing the 1951 revision as reinforcement for its mistaken belief that the Jones Act incorporated the restrictions of the original Section 28. At most that revision reflects a concern on the part of Con-

gress that leases of indefinite duration, found necessary for realization on oil and gas deposits, differed so markedly from the usual lease of other mineral deposits that they merited express exemption. The revision leaves usual leases of other mineral deposits subject to the discretion of the legislature under the Jones Act and the Enabling Act as first amended in 1936.

The amended Section 28 applies only to lands granted in 1910 and not to lands granted by the Jones Act. Whether required to do so or not, however, Arizona limits all of its non-hydrocarbon mineral leases to twenty years, as the amended Section 28 prescribes. Ariz. Rev. Stat. Ann. § 27-235(A). There is no principled basis on which it can be held that restrictions imposed earlier on dispositions of nonmineral lands modify the leasing discretion that Congress expressly granted the states when it conveyed mineral lands to them in the Jones Act and later confirmed in amendments to the original Enabling Act.

4. The court below chose to ignore the express language of the Jones Act and the amended Section 28 in concluding that an "explicit" release was needed to free Arizona from the restrictions on the disposition of granted lands that Congress in 1910 had imposed with respect to nonmineral lands and surface assets. The "same effect" language that it relied upon to impose the surface assets limitations of the 1910 act upon the mineral leasing regime authorized by Congress in 1927 simply will not bear the heavy weight placed upon it by the court below. The lower court's approach to statutory construction is inappropriate in any circumstance but is particularly mischievous in resolving an issue of federal-state relations.

Management of its fiscal affairs and its land is a central attribute of state sovereignty, and the education of school children lies at the heart of a state's services for its citizens. Having the power to set policy for those

state functions "is what gives the State its sovereign nature." *FERC v. Mississippi*, 456 U.S. 742, 761 (1982). This Court has repeatedly held that when Congress purports to limit a state as state in areas such as those, Congress must make its intention unmistakably clear. In *Pennhurst State School and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), this Court refused to read a federal statute enacted under Congress' spending power as imposing certain federal conditions on a state based on mere "innuendo" in the statute's text and its legislative history. This Court stated that when Congress intends to impose conditions on a state "it must do so unambiguously." *Id.* Likewise in *United States v. Bass*, 404 U.S. 336, 349 (1971), this Court held that, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance," and for that reason the Court in that case resolved an ambiguity in a federal statute in favor of the state.

When federal conscription of a state is based on the authority of the federal government to attach conditions to federal grants under Congress' spending power, the clear statement rule ensures that a state is informed of rights it will cede by choosing to accept the largess of the federal government so that the compact between the federal and state sovereigns will be truly voluntary. See *Pennhurst*, 451 U.S. at 25. Like a federal grant under the spending power, a "school land grant [is] a 'solemn agreement'" between the states and the federal government involving concessions on both sides, *Andrus v. Utah*, 446 U.S. 500, 507 (1980), and the rule of statutory construction requiring an unmistakably clear expression of congressional intent to impose conditions on the states must also apply to Congress' regulation of a state under the property clause. Conditions may not be imposed based on speculative implications from ambiguous text.

5. Finally, to the extent that the court below thought that this case was controlled by this Court's decision in *Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295 (1976), the court was plainly mistaken. *Alamo* involved the proper distribution of compensation for federal condemnation of state school lands. This Court held that a lessee could have a compensable interest in such lands and remanded for a determination whether the lessee had a valid lease from the state and if so how that lease should be evaluated. In so ruling this Court stated that rentals of grazing land at less than the land's appraised value were prohibited by Section 28 of Arizona's Enabling Act and that a lease at less than the appraised value would not entitle the holder of the lease to compensation upon condemnation. 424 U.S. at 311. The opinion does not mention the language in the amended Section 28 that permits Arizona to make grazing leases "in such manner as the Legislature of the State of Arizona may prescribe." Moreover, the Court had no occasion to consider the Jones Act of 1927, which has no application to grazing lands but is the source of the mineral leasing authority expressly granted to Arizona and other western states. Only this Court can authoritatively clarify the relevance of the *Alamo* decision to the issue presented in this case.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 8, 1988

APPENDICES

APPENDIX A

**IN THE SUPREME COURT
OF THE STATE OF ARIZONA**

No. CV-86-0238-T

Court of Appeals No. 1 CA-CIV 8616

Maricopa County Superior Court No. C-433745

FRANK and LORAIN KADISH; MARION L. PICKENS; and
the ARIZONA EDUCATION ASSOCIATION, a non-profit
corporation,
Plaintiffs-Appellants,

v.

ARIZONA STATE LAND DEPARTMENT, an agency of the
State of Arizona; JOE T. FALLINI, in his capacity as
the State Land Commissioner; and CYPRUS PIMA MIN-
ING COMPANY, on behalf of itself and others similarly
situated,
Defendants-Appellees,

ASARCO Incorporated, a New Jersey corporation; MAGMA
COPPER COMPANY, a Delaware corporation; JAMES P.
L. SULLIVAN, ESQ.; EISENHOWER MINING COMPANY,
a partnership; and CAN-AM CORPORATION, an Arizona
corporation,
Intervenors-Appellees.

[Filed Dec. 10, 1987]

Appeal from the Superior Court of Maricopa County
The HONORABLE JOHN STICHT, Judge

REVERSED AND REMANDED

FELDMAN, Vice Chief Justice

Frank and Lorain Kadish, Marion Pickens, and the Arizona Education Association, petitioners, brought a taxpayers' action against the Arizona State Land Department and others. The issue raised is whether the fixed royalty provisions of A.R.S. § 27-234(B), permitting the land department to lease minerals on a flat rate royalty, violate the appraisal and true value provisions of the Arizona Enabling Act and the comparable provisions of the state constitution.

FACTS AND PROCEDURAL BACKGROUND

The individual petitioners are taxpayers who allege that their taxes support public education in Arizona. The Arizona Education Association represents approximately 20,000 public school teachers throughout the state. All petitioners contend that the provisions of A.R.S. § 27-234(B),¹ fixing a flat rate, five percent royalty on min-

¹ Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the actual costs of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

A.R.S. § 27-234(B) (Supp. 1987) (emphasis added).

erals extracted from leased state school trust land impermissibly result in the extraction of minerals without payment of full value to the school trust. Petitioners claim that such a limitation of income is contrary to the appraisal and true value requirements of the Enabling Act and the Arizona Constitution. They seek a declaration that A.R.S. § 27-234(B) is void and ask for appropriate special action relief.²

The defendants originally named were the Arizona State Land Department, the State Land Commissioner, and Cyprus Pima Mining Company, a mineral lessee. The trial court allowed other mineral lessees of state school trust lands (Magma Copper Company, ASARCO, Inc., James Sullivan, Eisenhower Mining Company, and Can-Am Corporation) to intervene as defendants. (Original and intervenor defendants are hereafter referred to as "respondents.") The trial court eventually certified the case as a defendant class action pursuant to Rule 23, Ariz.R.Civ.P., 17 A.R.S. The class consists of all present and future mineral lessees of state lands.

The parties filed cross motions for summary judgment. The trial court granted respondents' summary judgment motions, and held A.R.S. § 27-234(B) did not violate the Arizona Enabling Act or the Arizona Constitution. Petitioners timely moved for an order transferring the case from division one of the court of appeals to this court. We granted the motion because the issues in this case are matters of first impression and substantial statewide importance. See Rule 19, Ariz.R.Civ.App.P., 17A A.R.S. We have jurisdiction pursuant to Ariz. Const. art. 6, § 5, A.R.S. §§ 12-102, -2103, and Rules 8 and 9, Ariz.R.P.Spec.Act., 17A A.R.S. We now reverse the judgment below, and remand with instructions to enter summary judgment in favor of petitioners.

² In Arizona, relief formerly obtained by writs of prohibition, mandamus or certiorari is now obtained by "special action." Rule 1, Ariz.R.P.Spec.Act., 17A A.R.S.

HISTORICAL BACKGROUND OF THE ARIZONA ENABLING ACT

The issue before us can neither be understood nor resolved without an understanding of the historical process from which it evolved. In 1910, the Arizona-New Mexico Enabling Act became law, authorizing the people of the territories of Arizona and New Mexico to form state governments. Act of June 20, 1910, Pub.L.No. 219 (ch. 310), 36 Stat. 557. Sections 19 through 35 of the Act referred exclusively to the proposed state of Arizona.³ The Enabling Act included provisions that confirmed prior land grants to the Arizona Territory and granted still more land to the new state. In 1911, the Arizona electorate accepted the land grants by ratifying art. 10, § 1 of the Arizona Constitution. The full provisions of the Enabling Act became part of the organic law of this state. Ariz. Const. art. 20, ¶ 12. See also *Gladden Farms, Inc. v. State*, 129 Ariz. 516, 518, 633 P.2d 325, 327 (1981). Because federal law is supreme in this field, neither this court, nor the legislature, nor the people may alter or amend the trust provisions contained in the Enabling Act without congressional approval. *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336 (1947).

Pursuant to the Enabling Act, the United States granted four sections of land in each township to Arizona. Almost ten million acres were granted. The land could be used *only* for the support of the common schools of the state (school trust lands) and for internal improvements to the state. See generally Dunipace, *Arizona's Enabling Act and the Transfer of State Lands for Public Purposes*, A ARIZ.L.REV. 133 (1966). The school land trust now encompasses approximately nine and one-half million acres. AUDITOR GENERAL, A PER-

³ Unless specifically stated to the contrary, all future references in this opinion to the Enabling Act pertain to the Arizona Enabling Act.

FORMANCE AUDIT OF THE STATE LAND DEPARTMENT, at 2 (1987).

Section 28 of the Enabling Act prohibited the sale, conveyance, or encumbrance of any part of the school trust land "except to the highest and best bidder at a public auction" after notice "duly given by advertisement." The state could dispose of the land or its products only if it obtained "true value" as determined by a prior appraisal. No disposal could be made "for a consideration less than the value so ascertained." Finally, § 28 provided that every disposition of the land or its products "not made in substantial conformity with the provisions of this Act [would be] null and void, any provisions of the constitution or laws of the said State to the contrary notwithstanding." Except for several matters irrelevant to the case before us, art. 10 of the Arizona Constitution is "pracically a rescript of section 28 of the Enabling Act." *Murphy*, 65 Ariz. at 348, 181 P.2d at 342.

Murphy capsulizes the historical reasons for the stringent provisions of the Enabling Act. Land grant acts similar to our Enabling Act previously had authorized the formation of other state governments. These acts had given the new states authority to determine how school trust lands were to be sold and the proceeds preserved for trust purposes. The result of this largess was highly unsatisfactory:

The sad experience of Congress with the handling by these twenty-three states of the granted lands, the sale thereof, and the investment of monies derived from a disposition of the granted lands, brought about a new policy which found expression in the Enabling Act for New Mexico and Arizona. The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state, and these granted lands and the monies derived from a disposition thereof were so poorly ad-

ministered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of experiences of the past, that such would not occur in the new states of New Mexico and Arizona.

Murphy, 65 Ariz. at 351, 181 P.2d at 344.

To ensure that Arizona and New Mexico would not dissipate the assets granted, Congress required that they hold the granted land in trust and enacted the restrictive provisions of § 28 of the Enabling Act noted above. 65 Ariz. at 351-52, 181 P.2d at 344-45, citing the report of Senator Beveridge, Chairman of the Committee on Territories, S. Rep. No. 454, 61st Cong., 2d Sess. (1910). *See also* 45 Cong. Rec. 8227 (1910) (explanation by Senator Beveridge in floor debate concerning strict safeguards on land transferred to the state of Arizona).

Congress's concerns were well-founded. New Mexico's experience was sadly typical. Despite the stringent trust restrictions of its Enabling Act, the New Mexico legislature enacted laws permitting the disposition of trust assets in a manner that breached the trust. *See, e.g.*, *Ervien v. United States*, 251 U.S. 41, 40 S.Ct. 75 (1919). In Arizona, the legislature authorized the investment of school trust funds in first mortgages upon supposedly valuable reclaimed farm land. These speculative expenditures were at best "non-beneficial." *See Murphy*, 65 Ariz. at 357, 181 P.2d at 348. The legislature eventually had to compensate the trust fund for the resulting losses by appropriating money out of the general fund. *See Udall v. State Loan Board*, 35 Ariz. 1, 273 P. 721 (1929); Laws of 1929, ch. 94.

Thus, the general intent of Congress is clear. It intended the Enabling Act to severely circumscribe the power of state government to deal with the assets of the common school trust. The duties imposed upon the state were the duties of a trustee and not simply the duties of a good business manager. *See generally County of*

Skamania v. State, 102 Wash.2d 127, 685 P.2d 576 (1984) (when managing and administering the trust lands, the state must comply with the same fiduciary obligations as apply to a private trustee). The grant in trust was intended to curb the power of the state to deal with the trust lands in the "prophetic realization, . . . that the state might [otherwise be] lured from patient methods to speculative advertising . . . in the hope of a speedy prosperity." *Ervien*, 251 U.S. at 47-48, 40 S.Ct. at 76. Thus, to comply with congressional intent, we must strictly apply the Enabling Act's restrictions regarding disposal of school trust assets.

With these principles in mind, we turn now to the specific provisions in the Enabling Act as originally adopted and as amended from time to time by Congress.

TREATMENT OF MINERAL LANDS UNDER THE ENABLING ACT AND ITS AMENDMENTS

A. *The Enabling Act as Originally Drafted*

Section 24 of the original Enabling Act excluded mineral lands from the initial grant to the state, but allowed the state to select "indemnity" sections in lieu of those lands. Thus, under the provisions of the original act, title to "known" mineral lands did not vest in the state, even though the land might have been one of the sections described in the grant. *See United States v. Sweet*, 245 U.S. 563, 38 S.Ct. 193 (1918). This exclusion created some difficulty as two types of mineral lands emerged. The first were lands "of a known mineral character at the time the initial grant vested in the states," while the second consisted of land "not known to be mineral in nature at the time of vesting, but upon which minerals were subsequently discovered." Note, *State Mineral Leases on Arizona School Lands*, 15 ARIZ.L.REV. 211, 219 (1973); *see also West v. Standard Oil Co.*, 278 U.S. 200, 49 S.Ct. 138 (1929). The United States Supreme Court

construed the grant to mean that states acquired vested rights in all school trust sections not known to be mineral at the time of the grant. The rights thus acquired were not defeated by subsequent mineral discovery. *Wyoming v. United States*, 255 U.S. 489, 41 S.Ct. 393 (1921). Because of the mineral land exclusion, however, title to the school grant lands which theoretically vested in the state at the time Arizona was admitted to the Union could be defeated if an adverse claimant established that at the time of admission the lands were known to be mineral lands. This dilemma was recreated in each of the other eleven western land grant states having mineral land exclusions in their respective enabling acts. See Report of Rep. Sinnott, Chairman of the Committee on Public Lands, House Hearings on S.Rep. No. 1761, 69th Cong., 2d Sess., at 2 (1926). See also 68 Cong.Rec. 1815-17, 1820-24, 2581 (1927) (floor debate on reasons for amendment of enabling acts). Of course, this situation left title to large tracts of land unsettled.

B. The Jones Act of 1927

To remedy this problem, Congress ultimately confirmed the entire school land grant to the western land grant states, regardless of the known or unknown mineral character of the land. See Act of Jan. 25, 1927, Pub.L. No. 570 (ch. 57), 44 Stat. 1026 ("Jones Act"). The Jones Act solved the vesting problem regarding mineral lands and required the western land grant states to reserve the mineral rights or any lands sold. It also gave the states authority to lease mineral deposits. The Jones Act made absolutely no mention of the Arizona Enabling Act provisions requiring disposition of school trust lands only after notice, advertisement, public auction, and sale to the highest bidder. More significantly, it also left untouched the provisions providing for appraisal and for sale for true value at not less than the appraised price. But, in prohibiting the outright sale of mineral lands

except with a royalty reservation, and in permitting lease of "coal and mineral deposits," the Jones Act further provided that such deposits "[should] be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools."

C. Do Disposal Restrictions Apply to Mineral Lands?

Respondent Magma contends that lease of mineral deposits was never covered by the disposal restrictions of § 28 of the Enabling Act, and to this day has not been included within those restrictions. This argument is only half correct. The Enabling Act of 1910 did not cover mineral leases simply because, under the grant, Arizona was not supposed to receive any mineral lands. However, that changed dramatically in 1927 when, by the Jones Act, Congress confirmed the vesting of *all* lands encompassed by the original grant of numbered sections to Arizona and the other land grant states. The Jones Act stated:

[T]he several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character (a) That the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

Pub.L. No. 570, 44 Stat. 1026 (1927) (emphasis added).

The quoted language indicates a clear intent that non-mineral lands that had vested under the prior land grant acts together with the mineral sections vesting under the

Jones Act should be held for the school trust purposes and under the same trust and dispositional restrictions as the vested nonmineral sections. Arizona, along with the other eleven land grant states, could not hold its mineral lands in the same way (to "the same effect") as its nonmineral lands.

The language of the 1910 Enabling Act had imposed restrictions on disposition of school trust land expressly applicable to "[a]ll lands, leaseholds, timber, and other products of land." Enabling Act, § 28. That statute further stated that the "[d]isposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust." *Id.* We believe these words accomplished just what the text clearly states: all land vesting in the school trust and all products of the lands were subject to the trust's dispositional restrictions. See, e.g., *Farmers Investment Co. v. Pima Mining Co.*, 111 Ariz. 56, 523 P.2d 487 (1974) (groundwater); *Department of State Lands v. Pettibone*, 702 P.2d 948, 954-56 (Mont. 1985) (groundwater and surface water rights). Thus, when Arizona obtained full vesting of mineral lands through the Jones Act in 1927, the dispositional restrictions and provisions of the 1910 Enabling Act became applicable to both the original lands and newly-acquired and vested mineral lands.⁴

D. The 1936 and 1951 Amendments

Congress amended § 28 of the Enabling Act, in part again to clarify mineral lease problems, by the Act of June 5, 1936 (Pub.L. No. 658 (ch. 517), 49 Stat. 1477), which provided for the lease of mineral lands for a term

⁴ See also *Jensen v. Dinehart*, 645 P.2d 32, 37 (Utah 1982) (Oaks, J., concurring and dissenting) ("There are no words in the Jones Act or its legislative history that exhibit any intent to remove or modify the trust restriction Congress had imposed on sections granted under the Enabling Act.").

of twenty years or less, and permitted leasing of agricultural and grazing land "in a manner as the State legislature may direct." The Enabling Act was again amended by the Act of June 2, 1951 (Pub.L. No. 44 (ch. 120), 65 Stat. 50) to provide that nothing in § 28 (which contained the restrictions on disposition of school lands) :

shall prevent: . . . 2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes,
. . .

Pub.L. No. 44 (ch. 120), 65 Stat. 50, 50 (1951). The 1951 amendment did remove the advertisement, bidding, and appraisal requirements for leases of hydrocarbon minerals, but it did not specify any changes in the leasing provisions for other types of minerals.

E. The Current Version of the Enabling Act

As the result of the amendments described above, the current version of § 28 of the Enabling Act (and basically of the Arizona rescript, art. 10, §§ 1, 3, and 4) reads as follows in relevant part:

That it is hereby declared that *all lands* hereby granted, including those which, having been heretofore granted to said Territory, are hereby expressly transferred and confirmed to the said State, *shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided* and for the several objects specified in the respective granting and confirmatory provisions, *and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.*

* * * *

Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction . . . notice of which public auction

shall first have been duly given by advertisement [there follows numerous specifications for the contents and manner of publication of the advertisement] Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, *in such manner as the Legislature of the State of Arizona may prescribe*, for grazing, agricultural, commercial, and domestic purposes, for a term of ten years or less; (2) *the leasing of any said lands, in such manner as the Legislature of the State of Arizona may prescribe*, . . . for mineral purposes, other than for the exploration, development and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands . . . for the exploration, development and production of oil, gas and other hydrocarbon substances . . . the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production

All lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained

(emphasis added).

THE CENTRAL ISSUE

In this court, respondents have focused their argument on the issue we believe is central to the case. Respondents rely on the phrase that first appeared in 1927 as part of the Jones Act amendment and which was basically continued in the subsequent amendments of 1936 and

1951. The pertinent language now states that nothing in § 28 of the Enabling Act shall prevent "the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe . . . for mineral purposes . . . for a term of twenty years or less." The respondents contend that these words give Arizona "full authority to set the terms of 20 year mineral leases, including the establishing of royalty rates, without the appraisement, advertising and bidding process" Answering Brief of Cyrus, ASARCO, and Eisenhower, at 8.

Thus, they conclude that A.R.S. § 27-234(B), which permits leases at a flat rate "royalty of five per cent of the net value of the minerals produced from the claim," is a proper exercise of the power given the state legislature, even if such a flat rate, statutory royalty results in some leases being made for less than the "true value" of the royalty interest.

A. Congressional Intent

To resolve this central issue, we now examine the intent of Congress with respect to the wording upon which respondents rely. The original Enabling Act contained the prohibitions already discussed, but provided for one exception: that "nothing herein contained shall prevent said proposed state from leasing any of said lands . . . for a term of five years or less without said advertisement herein required." Act of June 20, 1910, Pub. L. No. 219, § 28, 36 Stat. 557. The 1927 Jones Act, passed to resolve the mineral land title problem, for the first time permitted the lease of mineral sections "as the State legislature may direct." Pub. L. No. 570, 44 Stat. 1026. The 1936 act changed the wording to read that "nothing . . . shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands . . . for grazing and agricultural purposes for a term of ten years or less, or . . . for mineral purposes

[including oil and gas leases] for a term of twenty years or less." Act of June 5, 1936, Pub. L. No. 658 (ch. 517), 49 Stat. 1477.

Respondents contend that Congress intended the language used in the 1927 and 1936 amendments to permit the state to deal with mineral deposits on school trust lands in an unrestricted manner. We disagree for several reasons. First, an amendment ought not to be interpreted so broadly as to destroy the entire objective of the statutory scheme. Permitting disposal of vast mineral deposits at less than true value is completely contrary to the objectives sought by the restrictive wording of other portions of the Enabling Act. As the Oklahoma Supreme Court indicated in considering a similar problem, "[c]ommon sense dictates" against finding such an inexplicable congressional intent in dealing with mineral deposits. *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 237 (Okla. 1982) (court construed the Oklahoma enabling act provision which permitted leasing of trust lands "under such rules and regulations as the Legislature . . . may prescribe" as giving the legislature authority only to enact provisions designed to achieve the trust objectives of protection and maximum return of assets).

We should not interpret these amendments so that a "potentially self-defeating incompatability exists between the stated purpose and objective of the trust on the one hand, and the alleged unbridled authority granted the State Legislature to defeat that strategy by means of creative rules and regulations on the other hand." *Id.*; see also *State Land Department v. Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970) (the phrase "such manner as the legislature may direct" does not permit disposal free from § 28 restrictions, but merely gives the legislature authority to regulate the manner in which the lease is made and to set lease terms

that do not conflict with § 28), vacated on other grounds, 107 Ariz. 74, 481 P.2d 867 (1971).

We believe there is a rational and consistent explanation for the congressional amendments. As we have noted, the Jones Act was intended to resolve the title vesting problems inherent with mineral lands in the original grant to Arizona and other western states. It was also intended to prohibit the sale of mineral deposits, while still allowing their leasing on a royalty basis for terms of five years or less. Thus, in our view, the Jones Act provision that minerals could be leased "as the State legislature may direct" is more logically to be interpreted as part of the provision prohibiting the sale of mineral deposits but still permitting their lease on a royalty basis. It is not an unbridled grant of power that would allow the legislature to avoid the trust restrictions and duties imposed by the entirety of the Enabling Act. It gives the legislature power to regulate the overall manner of the making of the lease, and the general terms of the lease, so long as there is substantial conformity to the restrictions of § 28. *Tucson Rock & Sand Co., supra*.

The 1936 amendment merely extends the concept of "short-term" leases from five years to twenty years. The congressional record of the 1936 act indicates no intent to alter the basic trust duties and dispositional restrictions imposed on the Arizona state government. See generally S. Rep. No. 1939, 74th Cong., 2d Sess. (1936); H.R. Rep. No. 2615, 74th Cong., 2d Sess. (1936).

More importantly, Congress was quite aware of just how to give states the right to make mineral leases without meeting the appraisal or true value requirements of the Enabling Act. This can be seen from a brief look at New Mexico history. In 1922, the New Mexico Supreme Court held that mineral deposits on school trust lands might be leased without complying with the appraisal and true value requirements of the New Mexico

Enabling Act. *Neel v. Barker*, 27 N.M. 605, 204 P. 205 (1922). The lands at issue had been given to the New Mexico Territory under a pre-1910 congressional grant, but the court held that the New Mexico Enabling Act was not applicable to mineral lands no matter when obtained.

The decision was not tested in federal court. Entertaining serious doubts about the *Neel* decision, and concerned about the validity of titles that might vest under the holding, the New Mexico legislature petitioned Congress to authorize a state plebiscite to codify the rule of *Neel*. See 69 Cong. Rec. 1517-18, 2094-95 (1928) (explanations in floor debates by New Mexico representative and senator concerning need for and limited purpose of proposed joint resolution). Congress responded by passing a joint resolution giving the electors of New Mexico the right to amend their state constitution. See Joint Resolution No. 7, 45 Stat. 58 (1928). See generally S. Rep. No. 90, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 332, 70th Cong., 1st Sess. (1928). The new provision would permit state land mineral leases without appraisement, advertisement, or competitive bidding, though the proceeds were still to be used for school trust purposes.⁵

⁵ The complete text of Joint Resolution No. 7 is given:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That consent is hereby given and granted to the State of New Mexico and the qualified electors thereof to vote upon the question of amending the constitution of said State and to amend the same by the adoption of the following amendment proposed by the legislature of said State at its eighth regular session by H. J. Res. 8, approved March 11, 1927, to be designated as Article XXIV, said amendment being as follows, to wit:

"Article XXIV

"CONTRACTS FOR THE DEVELOPMENT AND PROTECTION OF MINERALS ON STATE LANDS

"Leases and other contracts, reserving a royalty to the State for the development and production of any and all minerals on lands granted or confirmed to the State of New Mexico by

The 1928 resolution applied solely to New Mexico and did not mention Arizona at all.⁶

The joint resolution indicates to us that had Congress intended that either the Jones Act or the 1936 amendment permit Arizona to engage in mineral leasing without compliance with the original appraisal and true value requirements, it would have used explicit language to accomplish that result, just as it did for New Mexico in Joint Resolution No. 7. The failure to do so in either the Jones Act, which came one year before the joint resolution, or in the 1936 amendment, which came eight years later, and the retention of the unqualified language regarding appraisal and true value in the paragraph of § 28 which follows the mineral lease provision, indicate to us that Congress did not intend Arizona to be free from the dispositional restrictions of the Enabling Act.

the Act of Congress of June 20, 1910, entitled 'An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States,' may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature; the rentals, royalties, and other proceeds therefrom to be applied and conserved in accordance with the provisions of said Act of Congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made."

Consent is also given and granted to said State to enact such laws and establish such rules and regulations as it may deem necessary to carry such constitutional provision into full force and effect should the same be duly and legally adopted.

Approved, February 6, 1928.

(emphasis in second paragraph added).

⁶ At a general election held on November 6, 1928, the New Mexico electorate added the substance of Joint Resolution No. 7 to the New Mexico Constitution as its Article XXIV.

The latest and most dramatic revisions of the Arizona Enabling Act in 1951 greatly reinforce this conclusion. In that statute (Pub. L. No. 44, 65 Stat. 51), despite a broader recommendation by the Secretary of the Interior,⁷ Congress specifically removed the appraisal, bidding, and advertising restrictions of § 28, but *only* as they applied to leases of oil, gas, and other hydrocarbon substances. *See generally* 97 Cong. Rec. 3628-29, 5731-32 (1951) (floor debates); *see also* S. Rep. No. 194, 82d Cong., 1st Sess. (1951); H.R. Rep. No. 429, 82d Cong., 1st Sess. (1951).

In its report, the Senate Committee on Interior and Insular Affairs described the effect of the 1951 amendment as one that

would change existing law by—(1) Permitting oil and gas leases to run for as long as oil and gas is produced in paying quantities . . . (2) Reserving a royalty to the State of not less than one-eighth of production from such [hydrocarbon] leases; and (3) Extending the exemption from the restrictions contained in the original Enabling Act which now applies to agricultural and grazing lands to include also commercial and homesite leases.

S. Rep. No. 194, 82d Cong., 1st Sess., at 2 (1951).⁸

In our view, the 1951 report of the Senate committee does not indicate a congressional belief that the 1927 Jones Act (permitting leasing on such terms "as the State legislature may direct") or the 1936 amendment (permitting mineral leasing "in a manner as the State

⁷ Letter dated July 20, 1950 from Oscar L. Chapman, Secretary of the Interior, to Hon. Joseph C. O'Mahoney, Chairman of the Senate Committee on Interior and Insular Affairs. S. Rep. No. 194, 82d Cong., 1st Sess. at 3-4 (1951).

⁸ The "exemption" referred to in clause 3 relates to the time extensions given in the 1936 amendment allowing the state to lease certain types of lands without the need for advertisement. *See* Pub. L. No. 658, 49 Stat. 1477 (1936).

legislature may direct") had effectively withdrawn mineral leasing from the stringent dispositional requirements of § 28 of the original Enabling Act. Further, neither the report nor the wording of the text itself permits us to conclude that Congress intended to accomplish such a result by the 1951 amendment. With respect to short term, nonhydrocarbon mineral leases, the 1951 amendment merely paraphrases in substantially identical terms the 1927 and 1936 wordings permitting grazing, agricultural, and mineral "leasing in a manner as the State legislature may direct."

Significantly, just as it had with 1928 Joint Resolution No. 7 pertaining only to New Mexico, in the 1951 amendment Congress again showed that when it wished to permit the state unrestricted authority to lease it would do so explicitly. The words it used in 1951 apply to oil, gas, and hydrocarbons alone. They are:

Nothing herein contained shall prevent: (2) the leasing of any of [school trust lands] in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes, other than . . . oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any of said lands, . . . for . . . oil, gas, and other hydrocarbon substances, . . . [these types of] leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production.

Pub. L. No. 44, 65 Stat. 51 (1951) (emphasis added). Here again, Congress showed that when it intended to free the state from the dispositional restrictions, it would do so explicitly.

Neither the text of the 1951 amendment nor the congressional intent to be derived from the record as a

whole permits us to conclude that the procedure *explicitly* authorized only for the lease of oil, gas, and hydrocarbon deposits is also somehow to apply to other types of mineral deposits. Moreover, if Congress did not regard the dispositional restrictions of the original Enabling Act as effective against mineral leases, why did it bother to create specific exemptions in 1951 for oil, gas, and other hydrocarbon leases? Obviously, Congress made those specific 1951 exemptions precisely because it believed the Enabling Act's stringent conditions were still in force.

B. Prior Judicial Construction

If we were inclined to reach a contrary conclusion on congressional intent and textual meaning, we would be promptly disabused by a review of the caselaw. In *State v. Lassen*, 99 Ariz. 161, 407 P.2d 747 (1965), this court held that the state had no obligation to compensate the school trust fund for a taking of school trust land made more the purpose of highway construction. The theory was that the construction of the highway across such trust lands would enhance the value of the remainder of trust land in an amount exceeding the value of the property taken for the highway. Rejecting this argument, the United States Supreme Court reversed, holding unanimously that the disposal restrictions of § 28 of the Enabling Act applied to the taking. *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 87 S.Ct. 584 (1967).⁹ The Court stated that the Enabling Act "unequivocally demands" that the trust fund be paid the full value of any lands transferred from it. *Id.* at 466, 87 S.Ct. at 588.

Of course, in *Lassen* the Court was dealing with the conveyance of surface rights rather than with lease of mineral deposits. Any question about the application of the *Lassen* rule to mineral leases was dispelled by *Alamo*

⁹ The *Lassen* case is discussed in Casenote, 9 ARIZ.L.REV. 113 (1967); Casenote, 42 WASH.L.REV. 912 (1967).

Land & Cattle Co. v. Arizona, 424 U.S. 295, 96 S.Ct. 910 (1976). In *Alamo*, the United States government had condemned school trust lands, and the question before the Court pertained to the division of the compensation award between the state, as owner of the fee title, and a lessee of a short term grazing lease. In effect, the lessee claimed a larger share of the compensation award on the theory that the lease had a bonus value because the rent contract was less than the fair rental value of the land.¹⁰

In commenting on the validity of a school trust leasehold made for less than fair rental value, Justice Blackmun, writing twenty-five years after the 1951 amendment and speaking for a seven-member majority of the Court, stated:

The New Mexico-Arizona Enabling Act has a protective provision against the initial setting of lease rentals at less than fair rental value. This is specifically prohibited by § 28. The prohibition is given bite by the further very drastic provision that a lease not made in substantial conformity with the act "shall be null and void." Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void and the holder of the claimed leasehold interest could not be entitled to compensation upon condemnation.

Alamo, 424 U.S. at 304-05, 96 S.Ct. at 917. Later in the opinion, Justice Blackmun rejected an argument advanced by the state with respect to its power to grant compensable property interests to lessees with the following comment:

¹⁰ Of course, the arguments made by respondents in this case with respect to short term mineral leases are equally applicable to short term grazing and agricultural leases, the lease of which was allowed by the 1936 and 1951 amendments in the same sentence as that allowing for leases of hard rock minerals.

One seemingly apparent and complete answer to this argument is that such § 28 goes on to authorize specifically a lease of trust land for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value." . . . Full appraised value is to be determined and measured at the times of disposition of the respective interests, and if the State receives those values at those respective times, the demands of the Enabling Act are met.

424 U.S. at 306-07, 96 S.Ct. at 917-18.

These statements seem fully dispositive of the issue. Respondents claim, however, that the quoted statements from the majority opinion in *Alamo* are both nonbinding dicta and an incorrect interpretation of the statutes and congressional intent. Even if we were to agree that the statements are dicta, we are not disposed to disregard the clear words of the United States Supreme Court on a matter of such vital public interest. For purists, however, we note our belief that the statements are not dicta. The Court remanded with instructions that the district judge determine whether *Alamo* held a valid leasehold and, if so, how it was to be evaluated. Finally, it instructed that if the leasehold value did prove to be substantially in excess of the rental set by the state, the district court should determine "whether it is permissible to find from that fact a violation of the Enabling Act's requirement" of appraisal and true value. *Alamo*, 424 U.S. at 312, 96 S.Ct. at 920; *see also id.* n.12. As we read the *Alamo* opinion, if the district court were to make such a finding, then the principles of law announced in the opinion would render the lease invalid, leaving the lessee no right to share in the award. Given the instructions on remand, we believe the Court's statements of the applicable principles of law are not dicta but are essential guidelines to the eventual disposition of the case.

Concluding this point, we reject the argument that the Supreme Court erred in its interpretation of congressional intent. We disagree with the contention and also regard it as having been made in the wrong forum.

Respondents argue that in *Farmers, supra*, this court held that short term mineral leases were exempt from the appraisal and true value restrictions of the Enabling Act. We do not agree. In *Farmers*, the issue was the validity of a lease authorizing the extraction of groundwater from school trust land without public auction and bidding. We held that groundwater was a product of the land, rather than a mineral, and that the state could not lease the right to withdraw water without public auction and bidding. In so doing, we noted in passing that the groundwater lease was different from a mineral lease, and stated that "[m]inerals are expressly excepted in § 28 and are subject to disposition as provided by the Legislature of the State." 111 Ariz. at 58, 523 P.2d at 489. We do not believe that this simple statement, made without analysis of the entire complex question presented in the present case, is equivalent to a holding that the state may lease the right to extract minerals from school trust land for less than the true, appraised value. In any event, this court has no power to overrule *Alamo*. *Farmers* must be read in conjunction with *Alamo* which, in our view, holds directly contrary to respondents' interpretation of *Farmers*.

RESOLUTION

A. Interpretation of the Enabling Act

We conclude from the foregoing that the Enabling Act is intended to protect the school trust land from dissipation by the state government. To curb such dissipation, Congress imposed severe restrictions on the method by which the state could sell or lease such lands. Undoubtedly the most important restriction is the appraisal/true value requirement. Furthermore, the amendments to the

Enabling Act do not explicitly exempt nonhydrocarbon minerals leases from the restrictions of § 28, as they do oil, gas, and other hydrocarbon leases. As we noted, the congressional record, while equivocal on some points, certainly demonstrates no congressional intent to remove the appraisal, trust, and true value restrictions from mineral leasing.

The Enabling Act is the "fundamental and paramount law" in Arizona. *Murphy*, 65 Ariz. at 345, 181 P.2d at 340. The courts have consistently construed the scope of federal land grants in favor of the government. *Mountain States Telephone & Telegraph Co. v. Kennedy*, 147 Ariz. 514, 516, 711 P.2d 653, 655 (App. 1985). In dealing with trust lands in particular, all doubts must be resolved in favor of protecting and preserving trust purposes. *United States v. New Mexico*, 536 F.2d 1324, 1326-27 (10th Cir. 1976).

Finally, as we read the views of the United States Supreme Court, as expressed in *Lassen*, and particularly in *Alamo*, we are bound to adopt the construction advanced by petitioners. We hold, therefore, that the Enabling Act and its rescript in art. 10 of the Arizona Constitution, forbid the state from making nonhydrocarbon mineral leases without appraisal or for less than their true value.

B. Validity of the Present Arizona Statute on Mineral Leasing

Respondents contend that the overall effect of A.R.S. § 27-234 benefits the school trust fund. While the application of a flat rate may result in the undervaluation of some leases, respondents argue that the statutory scheme promotes greater mineral exploration and development. Thus, they assert, more minerals are extracted from school trust land resulting in greater overall payments to the state at the five percent flat rate than under an appraisal/true value scheme.

There are two answers to this contention. First, a recent report of the Arizona Auditor General concludes that Arizona, the *only* state with a fixed, nonnegotiable royalty rate for mineral leases, has one of the lowest royalty rates in the nation. AUDITOR GENERAL, A PERFORMANCE AUDIT OF THE ARIZONA STATE LAND DEPARTMENT, at 19 (1980). Respondents do not dispute this fact.¹¹ Second, it is not certain that higher royalty rates discourage exploration and development and result in lower production. In fact, the data indicate that market forces determine production and royalty rates; a market royalty rate does not have a significant adverse effect on production. Smith, *Elements of Mineral Leasing Systems for State Lands with Comments on the Laws of Selected States*, at 44-47 (1980) (unpublished manuscript); Magma Brief, at A-102 to -105. In addition, we note that the state mineral royalty receipts had declined to \$1.3 million in 1986 from the 1980 return of almost \$8 million. AUDITOR GENERAL, A PERFORMANCE AUDIT OF THE STATE LAND DEPARTMENT, at 45 (1987). Thus, it appears that the net flat rate statute has not served to protect the state's royalty income from the market-related decline in mineral production of the last decade.

Further, respondents' cause would not be enhanced even if the overall effect of A.R.S. § 27-234(B) encourages greater production so that lessees pay higher total royalties to the state than would be paid on a fair value basis. The United States Supreme Court has specifically rejected such arguments. In *Lassen*, the state argued that the highway department's acquisition of school trust lands for highway purposes without payment would have an overall beneficial effect on the value of the remaining

¹¹ See also JOINT LEGISLATIVE BUDGET COMMITTEE, FOLLOW-UP REPORT OF PERFORMANCE AUDIT RECOMMENDATIONS FOR THE ARIZONA STATE LAND DEPARTMENT, at 3-5 (Sept. 1982) (use of net royalty results in substantially reduced royalty revenues compared with gross royalty).

school trust lands. The state posited that the improvements made would enhance the lands' value and thus promote their sale because the highway would make the lands more accessible. The Supreme Court rejected that argument, holding that the fair value requirement could not be discarded on the basis of speculative predictions about possible future development and values. Such methods did not comply with the basic purposes of Congress in imposing trust restrictions. 385 U.S. at 468-69, 87 S.Ct. at 589-90.

Finally, unlike most mineral lease royalties, the Arizona flat rate royalty is computed on the "net value" of the minerals extracted. *See* ROCKY MOUNTAIN MINERAL LAW FOUNDATION, 3 AMERICAN LAW OF MINING ch. 63 (2d ed. 1986). Under the Arizona statute, the net value is determined by subtracting both the cost of extraction and the cost of "processing." Given a gross value set by the market, and deduction of extraction, transportation, and processing costs, many minerals may have no "net value" at all as far as the statutory formula is concerned. Thus, under § 27-234(B) it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever. Of course, we have no way of knowing from this record whether such circumstances have existed, but the possibility is implicit in the statute.

The State Land Department contends that we may "save" the statute in question simply by holding that the five percent flat rate royalty is a minimum, below which no lease can be made. Armed with the "such manner as the Legislature directs" wording, the state legislature undoubtedly may set a minimum royalty for each lease of mineral deposits. It is obvious, however, that § 27-234 does just the opposite. The statute does not provide for a five percent minimum with an actual rental to be based upon appraisal and true value. It simply provides for a five percent flat rate. Flat rates set a maxi-

mum return. *Tucson Rock & Sand Co., supra*. There is, in short, little to save.

In any event, whatever the overall benefit to the state of a flat net rate scheme, we do not believe that a statute that makes it possible to dispose of trust assets without payment of true value can be upheld under the trust duty concept required by the Enabling Act. *County of Skamania, supra*. We hold, therefore, that A.R.S. § 27-234 violates art. 10 of the Arizona Constitution and § 28 of the Enabling Act. The statute is unconstitutional and void as to nonhydrocarbon mineral leases.¹²

ATTORNEY'S FEES

We must also consider the matter of attorney's fees. Petitioners seek an allowance of fees against the State Land Department and the State Land Commissioner ("State") on several grounds. First, they claim entitlement to an allowance of fees under A.R.S. § 12-348(A). That statute requires an award of fees to a party who prevails by adjudication on the merits in:

(3) A court proceeding to review an agency decision or any other statute authorizing judicial review of agency decisions;

* * * *

(5) A special action proceeding brought by the party to challenge an action by the state against the party.

The State argues that neither of the subsections is applicable. It first urges that this case does not involve

¹² Arizona contains a wide variety of commercially exploitable hydrocarbon and nonhydrocarbon minerals. See the detailed discussion in COMMITTEE ON INTERIOR AND INSULAR AFFAIRS, MINERAL AND WATER RESOURCES OF ARIZONA, 90th Cong., 2d Sess., at 59-467 (1969). In recent year, Arizona's mines have produced over one billion dollars annually in metallic ores alone. *See, e.g.*, UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF MINES, 2 MINERALS YEARBOOK: 1985, at 59-77 "The Mineral Industry of Arizona" (1985).

a review of the agency decision to award any particular lease nor does any statute authorize judicial review of such decisions of the State Land Department. We agree that this case does not represent a "proceeding to review an agency decision," unless one defines "decision" as encompassing the department's day-to-day operations in making and renewing leases over the years since the legislature enacted § 27-234(B). We do not believe that this is what the legislature intended by the fee statute. In our view, the legislature contemplated a specific proceeding or dispute with an agency in which a particular determination by that agency is challenged and is set aside. *See New Pueblo Constructors, Inc. v. State*, 144 Ariz. 95, 696 P.2d 185 (1985) (court disallowed fees under § 12-348(A)(3) when contractor sued state to obtain damages incurred pursuant to state's breach of construction contract). In the case before us, petitioners challenge the statute the agency applied. They did not ask the court to review an agency decision as required by A.R.S. § 12-348(A)(3). Nor do we believe a fee award can be based on subsection (5). The state took no action "against" petitioners when it awarded leases to respondents.

Petitioners also claim to be eligible for an award of fees under the so-called "substantial benefit doctrine." Under this doctrine, courts have inherent equitable power to award fees, notwithstanding the "American Rule" against recovery of fees in the absence of statutory authority. *See Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943 (1973). Arizona law is cognizant of the substantial benefit doctrine, but has neither adopted nor rejected it. *See State v. Boykin*, 112 Ariz. 109, 113-14, 538 P.2d 383, 387-88 (1975) (vacating the trial court's award of fees based on "inherent power" as an abuse of discretion because the "private attorney general" doctrine was inapplicable where the "appellees were not pressing their claim in hopes of directing 'substantial benefits to the

general public.'") 112 Ariz. at 114, 538 P.2d at 388.). In the case before us, unlike *Boykin*, it is obvious that petitioners seek no recovery for themselves, and will achieve no personal advantage. They do not act for their own benefit, nor even for the benefit of a particular class or group, but only for the purpose of vindicating the interests of the entire citizenry of the state of Arizona. *See generally Note, Equitable Attorney's Fees to Public Interest Litigants in Arizona*, 1984 ARIZ. ST.L.J. 539 (1984). They have succeeded and have conferred a substantial benefit on the citizens of Arizona. Given these circumstances, and the direct contemplation of the last paragraph of § 28 of the Enabling Act that citizens of the state may act for the benefit of the state as a whole in enforcing the dispositional restrictions of § 28, the author and Chief Justice Gordon believe that an award of fees is proper. *See also Comment, Important Rights and the Private Attorney General Doctrine*, 73 CALIF. L.REV. 1929 (1985).

CONCLUSION

The judgment of the trial court is reversed. The case is remanded with instructions to enter judgment in favor of petitioners, Kadish, Pickens, and the Arizona Education Association. The trial court is instructed to enter a judgment declaring A.R.S. § 27-234 unconstitutional and invalid as it pertains to nonhydrocarbon mineral leases. There being neither a majority nor plurality in favor of a fee award, no fee allowance is ordered.

Petitioners also sought special action relief from the trial court. It is not possible to tell on this record just what further relief is appropriate. The trial court is instructed to hear arguments and, if appropriate, take evidence on that question and to grant such relief as may be appropriate and consistent with the principles announced in this decision.

STANLEY G. FELDMAN
Vice Chief Justice

CONCURRING:

FRANK X. GORDON, JR.

Chief Justice

Justice James Moeller did not participate in the determination of this matter.

HOLOHAN, Justice, concurring

I concur, except with that portion of the opinion permitting the allowance of fees.

WILLIAM A. HOLOHAN

Justice

CAMERON, Justice, dissenting

I regret that I must dissent. We are presented with two questions:

1. Did Congress intend for mineral leases to be subject to the appraisal, competitive bidding, and advertising requirements of Section 28 of the Enabling Act?
2. Does the fixed-rate royalty provision of A.R.S. § 27-234(B) provide maximum revenue for school lands consistent with the trust principles imposed by the Enabling Act on federally granted lands?

I believe the answer to Question 1 is no and the answer to Question 2 is yes. I would, therefore, affirm the decision of the trial court.

INTENT OF CONGRESS

At the time of enactment, the Enabling Act imposed an appraisal requirement on "[a]ll lands, leaseholds, timber and other products of the land." As originally enacted, the Enabling Act did not grant to the states

known mineral lands. Subsequent discovery of minerals on vested lands, however, would not void title. See *Wyoming v. United States*, 255 U.S. 489, 41 S.Ct. 393 (1921).

In 1922, the Supreme Court of New Mexico held that since Congress had not originally contemplated the conveyance of any mineral lands to the state via the Enabling Act, it had not intended that the Enabling Act's leasing provisions should govern mineral leasing procedures. *Neel v. Barker*, 27 N.M. 605, 204 P. 205 (1922). The court held valid an oil and gas lease issued without the procedural requirements of formal appraisal, advertisement, or public auction. *Id.* at 605, 204 P. at 205. Subsequently, the New Mexico Legislature requested that Congress authorize a constitutional amendment codifying *Neel v. Barker*. Congress responded by passing the Act of February 6, 1928, ch. 28, 45 Stat. 58, which authorized New Mexico to lease lands granted under the Enabling Act for mineral purposes without regard to appraisal, advertising, or competitive bidding. The mineral rights in the granted lands, however, could not be sold by the state, but only leased. Following the New Mexico example and as a result of the Jones Act, Arizona, prior to the 1936 amendment, similarly could have leased its granted lands for mineral purposes without complying with the appraisal, advertising, and bidding requirements. Pub. L. No. 570, ch. 57, 44 Stat. 1026 (1927).

The Act of June 5, 1936, ch. 517, 49 Stat. 1477, provided for the lease of mineral lands for a term of twenty years or less, "in a manner as the State legislature may direct." Subsequently, section 28 was amended again by the Act of June 2, 1951, ch. 120, 65 Stat. 50. This amendment liberalized the restrictions placed on school lands, stating in part:

Nothing herein contained shall prevent: . . . 2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe,

whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less;

Pub. L. No. 44, ch. 120, 65 Stat. 50 (1951); see Ariz. Const. art. 10, § 3, Congress, in plain words, granted the Arizona Legislature the power to lease school lands for mineral development for a term of 20 years or less, in such a manner as Arizona's legislature might elect.¹

In construing the 1936 amendment consistent with its historical background, the state legislature, in prescribing the manner for leasing mineral lands, is not limited by the requirements of appraisal, competitive bidding and advertising.² See *Farmers Inv. Co. v. Pima Mining Co.*, 111 Ariz. 56, 58-59, 523 P.2d 487, 489 (1974) ("Minerals are expressly excepted in § 28 and are subject to

¹ Speculators mulling the reasons for this liberalization contend that a change in Congressional policy occurred in the 1950s concerning the type of restrictions placed on trust lands. The Alaska Statehood Act, P.L. 85-508, 72 Stat. 339 (1958), for example, imposed no trust provisions or other limitations on Alaska's state lands, i.e., Alaska was given a "free transfer." The Alaska state land policy, therefore, reflects a veritable about-face by Congress when it is compared with the restrictions placed upon Arizona. The potential concerns and harms caused by an absence of trust controls on state land is stated accurately by one commentator: "If there is to be no control over the price of sale or lease, certainly the pro-school forces have sufficient grounds to be alarmed. There could be a total depletion of the trust lands with almost no income—all in the name of the public good." Dunipace, *Arizona's Enabling Act and the Transfer of State Lands for Public Purposes*, 8 ARIZ. L. REV. 133, 138 (1966).

² Minerals clearly are not subject to appraisal as "other products of the land." Because mineral lands were reserved to the federal government under the Enabling Act, Congress could not have contemplated their inclusion in "other products of the land." See *State Land Dept. v. Tucson Rock & Sand Co.*, 107 Ariz. 74, 76, 481 P.2d 867, 870 (1971).

disposition as provided by the Legislature of the State.") Considering the history of the legislation and the amendments to our Enabling Act, I believe the legislature has the power to provide for leasing of mineral lands without appraisal.

MAXIMUM RETURN

In 1981, we held that school trust lands could not be sold without public auction to the Arizona Division of Emergency Services (ADES), even though ADES was a state agency. *Gladden Farms, Inc. v. State*, 129 Ariz. 516, 633 P.2d 325 (1981). The court found it important to note that simply because sale of the land in trust to another state agency, it did not necessarily provide the protection to the trust lands that Congress intended. *Id.* at 520, 633 P.2d at 329. Furthermore, the court also commented that the purpose for the sale of lands in trust is irrelevant; of paramount concern is maximum return from the trust:

However worthwhile and desirable this sale may be for the humanitarian purposes for which it is made, we do not believe that the sale without auction and bid assures the "highest and best" price that the Enabling Act requires. The Enabling Act does not allow trust lands to be used for the purpose of subsidizing public programs no matter how meritorious the programs.

Id. at 521, 633 P.2d at 330.

Court opinions concerning the trust land provisions in Arizona strictly interpret the Enabling Act in order to protect the beneficiaries of the trust. Even though mineral leases are exempt from the Enabling Act's formal leasing requirements, mineral lands are included in the corpus of the state trust properties and the state is not absolved from its fiduciary duties as trustee. *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584 (1967). The state,

as trustee, acts in a fiduciary capacity in the administration of state trust lands and has a duty to maximize the revenues generated by the trust corpus. If the fixed-rate royalty limits the return from the trust land, then it would be contrary to the provisions of the trust and would be deemed a breach of the trust. Act of June 20, 1910, ch. 310, 36 Stat. 557 § 28. See also *Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295, 96 S.Ct. 920 (1976).

At the time of the filing of the instant case, the relevant portion of A.R.S. § 27-234 provided:

B. Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim. The net value shall be deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production thereof. In case of minerals not processed for commercial use, the net value shall be the gross proceeds, or gross value, at the place of sale or use, less the actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production thereof.

A.R.S. § 27-234(B).

In reviewing the testimony in the trial court, I believe there is sufficient evidence from which it can be found that a royalty of five percent returns an equal if not a greater amount to the school trust account than could be obtained through other methods of leasing. The legislature, in establishing a royalty rate, may balance the revenue to be received with the discouragement of future mining operations that might occur with the imposition

of higher royalty rates. Furthermore, it should be noted that mineral deposits are of a unique nature. While timber, range land and even rock and gravel can be easily evaluated and appraised before exploitation, mineral deposits are almost impossible to value until after extensive and often expensive exploration. Such deposits must first be discovered, explored and developed before mining.

In this regard, the statement by the majority should be noted that "the state mineral royalty receipts had declined to \$1.3 million in 1986 from a 1980 return of \$8 million. . . . It appears that the net flat rate statute has not served to protect the state's royalty income from the market-related decline in mineral production of the last decade." Slip opinion, page 30. I believe this is misleading. The decline in mineral production in the past decade was due to market conditions and not the flat rate royalty. Indeed, rising costs of production of mineral could well have resulted in less production and less revenue. As the brief of Magma Copper pointed out, there is no positive correlation between royalty rates and income derived from state trust lands. To the contrary, the Auditor General's Report shows that California has the highest royalty rate of the states examined, but the revenue derived from all state mineral leases totalled only \$259,000 for the fiscal year 1978-79. Arizona for the same fiscal year generated an income of \$3.4 million.

In the appendix to Magma Copper's brief, Spencer Smith stated that he examined the status of California's metallic leases and that: "The ten percent minimum royalty imposed in California is one of the primary reasons for the lack of metallic mineral production on their [California's] state lands." Letter from Spencer A. Smith to C. J. Hansen, President Arizona Mining Association (December 22, 1980) (discussing S. Smith, Elements of Mineral Leasing Systems for State Lands with Com-

ments on the Laws of Selected States (July 7, 1980) (unpublished article)).

I believe that the legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands. I would hold that A.R.S. § 27-234(B) does not violate the Enabling Act or the Arizona Constitution.

I would affirm the judgment of the trial court.

JAMES DUKE CAMERON,
Justice

APPENDIX B

SUPERIOR COURT OF ARIZONA MARICOPA COUNTY

CC12-88725 January 2, 1985
No. C 433745

HON. JOHN R. STICHT
Vivian Kringle, Clerk
P. Cook, Deputy

FRANK AND LORAIN KADISH, *et al.*

v.

ARIZONA STATE LAND DEPARTMENT,
an agency of the State of Arizona, *et al.*

MAGMA COPPER COMPANY,
a Delaware Corporation doing business in Arizona, *et al.*,
Intervenors.

Plaintiffs' Motion for Partial Summary Judgment, the Motion for Summary Judgment of Magma Copper Company and the Motions to Dismiss of ASARCO Incorporated and Eisenhower Mining Company, which have been treated as Motions for Summary Judgment, have been under advisement. After considering the briefs of all parties, the Court finds that there are no genuine issues of material fact and that Defendants are entitled to Summary Judgment as a matter of law.

Plaintiffs have brought this action testing the validity of A.R.S. § 27-234(B) which provides for a fixed royalty for mineral leases of State lands. That statute provides for payment to the State by the lessee of a royalty of five percent (5%) of the net value of minerals produced from the claim. In particular, Plaintiffs argue that, as to school trust lands, the fixed royalty violates § 28, Paragraph 4 of Arizona's Enabling Act and Art. 10 § 4 of the Arizona Constitution which require that all such lands, leaseholds, timber and other products of land, before being offered for sale or lease, shall be appraised at their true value and that no sale or other disposal thereof shall be made for a consideration less than the value ascertained.

Plaintiffs claim that the various mineral leases held by the Intervenors of State trust lands are void. The Intervenors claim that the leases, which are all for 20 years or less, fall within the exception provision of § 28, Paragraph 3 of the Enabling Act and Art. 10 § 3, Paragraph 2 of the Arizona Constitution which provide for the leasing of mineral lands for a term of 20 years or less "as the legislature may direct". Intervenors claim that the quoted language on its face, and viewed in legislative historical perspective, permits the State legislature to control the terms and manner of the leases of mineral lands for a period of 20 years or less, without regard to advertisement, bidding or appraisement. In rebuttal, Plaintiff argues that this interpretation ignores the fundamental purpose of the trust restrictions in the Enabling Act and is meant to be language dealing only with the procedure of leasing and not a release from the prior appraisal requirements.

The Court has reviewed the legislative history behind the 1910 New Mexico-Arizona Enabling Act, the Arizona amendments in 1936 and 1951, the corresponding amendments to the Arizona Constitution and the New Mexico experience in addition to the 1927 Act and the cases cited.

These matters have been covered thoroughly in the comprehensive briefs of the parties and the arguments relating thereto will not be reiterated here. Suffice it to say that the Court concludes that the language "as the legislature may direct" which was inserted by Congress in the 1936 amendment to § 28, Paragraph 3 and carried forward in the 1951 amendment, reflects the intent by Congress to place Arizona on an equal footing with the other states in dealing with its mineral lands, including the right to lease said lands for a term of 20 years or less without regard to prior appraisement, advertising, bidding and public auction. The Court recognizes that there is strong language in *Alamo Land and Cattle Company Inc. v. Arizona*, 424 U.S. 295 (1976) which indicates that prior appraisement is necessary before leases shall be given. However, the issue currently before the Court was not at issue in the *Alamo* case and thus this Court finds that the language is not controlling.

IT IS ORDERED denying Plaintiffs' Motion for Partial Summary Judgment.

IT IS FURTHER ORDERED granting Intervenors' Motions for Summary Judgment, the Court finding that A.R.S. § 27-234(B) does not violate either the Arizona Enabling Act or the Arizona Constitution.

APPENDIX C

**IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

No. C433745

FRANK AND LORAIN KADISH; MARION L. PICKENS; and the ARIZONA EDUCATION ASSOCIATION, a nonprofit corporation,

Plaintiffs,

v.

ARIZONA STATE LAND DEPARTMENT, an agency of the State of Arizona; JOE T. FALLINI, in his capacity as the State Land Commissioner; and CYPRUS PIMA MINING COMPANY, on behalf of itself and others similarly situated,

Defendants,

ASARCO Incorporated, a New Jersey corporation; MAGMA COPPER COMPANY, a Delaware corporation; JAMES P. L. SULLIVAN, ESQ.; EISENHOWER MINING COMPANY, a partnership; and CAN-AM CORPORATION, an Arizona corporation,

Intervenors.

JUDGMENT

This action was on January 26, 1984 certified by the Court to be maintained pursuant to Rule 23(b)(1)(B) against a class of parties consisting of those holding or who will hold in the future mineral leases administered by the Arizona State Land Department, the Court directing that Plaintiffs give a prescribed Notice of Class Action Certification to all parties currently holding mineral leases administered by the Arizona State Land Department and further directing that Defendant Arizona

State Land Department give said notice to all its future mineral lessees at or before the time the new mineral leases take effect.

The Court allowed the following holders of mineral leases to intervene:

ASARCO Incorporated
Magma Copper Company
Eisenhower Mining Company
James P. L. Sullivan
Can-Am Corporation

and each of said Intervenors filed an Answer.

The Order of the Court certifying this action as a Class Action designated Defendant Cyprus Pima Mining Company and Intervenor Defendants ASARCO Incorporated and Magma Copper Company through their respective counsel as representatives of the class finding that they will fairly and adequately protect the interest of the class.

Plaintiffs' Motion for Partial Summary Judgment and the Motion for Summary Judgment filed by Magma Copper Company and the Motions to Dismiss (treated as Motions for Summary Judgment by the Court) filed by ASARCO Incorporated and Eisenhower Mining Company were heard on September 7, 1984. At said hearing Intervenor James P. L. Sullivan appeared pro se and Plaintiffs and each of the other Intervenors appeared through their respective legal counsel.

The Court having read the Motions and supporting affidavits and the Response of the Attorney General on behalf of Defendant State Land Department, and having heard the arguments of counsel made at said September 7, 1984 hearing and being fully advised in the premises, on January 2, 1985 entered its Order by minute entry finding that there are no genuine issues of material fact and denying Plaintiffs' Motion for Partial Summary

Judgment and granting Intervenors' Motion for Summary Judgment;

NOW, THEREFORE, on motion of Intervenors, it is ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' complaint be and the same is hereby dismissed with prejudice; and
2. Each party shall bear its own costs and attorneys' fees.

DONE IN OPEN COURT this 22nd day of July, 1985.

/s/ John R. Sticht
HONORABLE JOHN R. STICHT
 Judge of the Superior Court

Original of the foregoing lodged
 this 12th day of July, 1985, with:

The Honorable John R. Sticht
 Judge of the Superior Court
 Maricopa County—Division 41
 201 West Jefferson
 Phoenix, Arizona 85003

and a copy mailed this 12th day of
 July, 1985, to:

David S. Baron, Esq.

Amy J. Gittler, Esq.
 Arizona Center for Law in the
 Public Interest
 32 North Tucson Boulevard
 Tucson, Arizona 85716
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 Mining Company

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 Attorneys for Magma Copper Company

James P. L. Sullivan
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 Scottsdale, Arizona 85257

Mark S. Sifferman, Esq.
 Molloy, Jones, Donahue, Trachta,
 Childers & Mallamo, P.C.
 Suite 2001, Great Western Bank Plaza
 4041 North Central Avenue
 Phoenix, Arizona 85012
 Attorneys for Can-Am Corporation

/s/ Burton M. Apker
BURTON M. APKER

APPENDIX D

[SEAL]

**SUPREME COURT
STATE OF ARIZONA.**

201 West Wing State Capitol
 1700 West Washington
 Phoenix Arizona 85007-2866
 Telephone (602) 255-4536

DAVID R. COLE
 Clerk of Court

February 3, 1988

RE: FRANK and LORAIN KADISH et al vs. AZ STATE
 LAND DEPT et al
 Supreme Court No. CV-86-0238-T
 Court of Appeals No. 1 CA-CIV 8616
 Maricopa County No. C-433745

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on February 2, 1988, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration on the Issue of Attorneys' Fees [Appellants Kadish/Pickens/AZ Ed Assn] = DENIED.

FURTHER ORDERED: Motion for Leave to File Reply [Appellants Kadish] = GRANTED.

Justice Moeller did not participate in the determination of this matter.

Mandate enclosed.

DAVID R. COLE, Clerk

TO:

Amy J. Gittler, Esq., Brown & Bain
 David S. Baron, Esq., Arizona Center for Law in
 the Public Interest
 Hon. Robert K. Corbin, Attorney General
 Attn: Melinda L. Garrahan, Esq. and James T.
 Skardon, Esq.
 Tom Galbraith, Esq., Lewis and Roca
 Burton M. Apker, Esq., Kaufman, Apker &
 Nearhood
 Howard A. Twitty, Esq., Twitty, Sievwright & Mills
 James P. L. Sullivan
 Mark S. Sifferman, Esq., Molloy, Jones, Donahue,
 Trachta, Childers & Mallamo
 Arthur J. Waskey, Esq., New Mexico State Land
 Office
 Attn: Louhannah M. Walker, Esq.

APPENDIX E

Jones Act of 1927, as amended, ch. 57, Pub. L. No. 570, § 1, 44 Stat. 1026-27; ch. 151, Pub. L. No. 110, 47 Stat. 140 (1932); ch. 169, Pub. L. No. 340, 68 Stat. 57 (1954); ch. 572, Pub. L. No. 699, 70 Stat. 529 (1956) (codified as amended at 43 U.S.C. § 870 (1976)).

Subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) That the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) That the additional grant made by this Act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and* rentals and royalties therefrom to be utilized for the

* The word "and" was introduced here probably by mistake instead of the word "of" when the act was amended in 1932. As quoted in text, the language as originally enacted in 1927 referred to "the proceeds of rentals and royalties."

support or in aid of the common or public schools: *Provided*, That any lands or minerals hereafter disposed of contrary to the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) Except as provided in subsection (d), any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceedings in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claims, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act.

(d) (1) Notwithstanding subsection (c), the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States, or an application therefor, shall not prevent the grant of such numbered school section to the State concerned as provided by this Act.

(2) Any such numbered school section which has been surveyed prior to the date of approval of this amendment, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after the date of approval of this amend-

ment and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the United States, shall (unless excluded from the provisions of this section by subsection (c) for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey; and the State shall succeed to the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this Act, in accordance with the Act of June 12, 1934 (48 Stat. 1185, 43 U.S.C. 871a). Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State.

(5) Where at the time rents, royalties, and bonuses accrue the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, the rents, royalties, and bonuses shall be allocated between them in proportion to the acreage in said lease owned by each.

(6) As used in this subsection, 'lease' includes 'permit' and 'lessor' includes 'grantor'.

New Mexico-Arizona Enabling Act of 1910, ch. 310, Pub. L. No. 219, § 24.

Sec. 24. That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or

fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein

New Mexico-Arizona Enabling Act of 1910, as amended, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574-75; ch. 517, Pub. L. No. 658, 49 Stat. 1477 (1936); ch. 120, Pub. L. No. 44, 65 Stat. 51 (1951).

Sec. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatso-

ever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to in-

clude a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private, under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

ARIZ. REV. STAT. ANN. § 27-234(B) (1976 and Supp. 1987).

B. Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

Supreme Court, U.S.

FILED

MAY 24 1988

(2)
No. 87-1661
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

ASARCO, Incorporated, et al.,
Petitioners,
v.

Frank and Lorain Kadish, et al.,
Respondents.

**ON PETITION FOR A WRIT CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARIZONA**

RESPONDENTS' BRIEF IN OPPOSITION

DAVID S. BARON
Arizona Center for Law
in the Public Interest
3208 East Fort Lowell
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Tucson, Arizona 85716
(602) 327-9547

Counsel for Respondents

QUESTION PRESENTED

Pursuant to the 1910 Arizona Enabling Act, Congress granted to the State of Arizona millions of acres of land to be held in trust for the benefit of the state's public school system. Such lands were to be sold or leased only for their "true value" as established by appraisal. Under the Jones Act of 1927, Congress specifically "extended" this land grant to include mineral lands and directed that this additional grant should "be of the same effect" as the original one in 1910. Despite the inclusion of minerals in the trust, the State of Arizona has for years disposed of school trust minerals under a statute that actually prohibits individual appraisal of mineral lands and imposes one inflexible royalty rate for all minerals extracted. The statute further requires that royalties be calculated as a percentage of net mineral value - that is, the value after deduction of production costs - a practice that in some cases mandates an outright giveaway of school trust mineral resources.

The question presented is whether the Arizona Supreme Court correctly invalidated this statute under the Arizona Constitution and the Enabling Act as a breach of the state's trust responsibilities to maximize revenues for the benefit of the public schools.

LISTINGS REQUIRED BY RULE 28.1

The Arizona Education Association (AEA) is a non-profit corporation affiliated with the National Education Association (Washington, D.C.). The AEA has local affiliates of its own in approximately 130 Arizona school districts (e.g., Tucson Education Association, Flagstaff Education Association, Mesa Education Association).

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No. 87-1661**In The****Supreme Court of the United States****October Term, 1987****ASARCO, Incorporated, et al.,***Petitioners,***v.****Frank and Lorain Kadish, et al.,***Respondents.***ON PETITION FOR A WRIT CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARIZONA****RESPONDENTS' BRIEF IN OPPOSITION**

Respondents Frank and Lorain Kadish, Marion Pickens, and the Arizona Education Association hereby oppose the petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Arizona in this case.

COUNTERSTATEMENT OF THE CASE

For purposes of this brief, respondents incorporate the statement of facts and historical background as set forth by the Arizona Supreme Court. Petition for Writ

of Certiorari (Petition) at 2a. The following statement notes several significant omissions and mischaracterizations by the petitioners.

The petitioners do not fully explain the nature and impact of the mineral royalty statute invalidated by the Arizona Supreme Court. In Arizona, school trust lands are administered by the Arizona State Land Commissioner. Ariz. Rev. Stat. Ann. §§ 37-101, -131. Under the mineral royalty statute, however, the State Legislature has prescribed a fixed royalty formula that must be followed by the Commissioner in disposing of school trust minerals. Under the statute, Ariz. Rev. Stat. Ann. § 27-234(B), the royalty for extraction of minerals from state land must in every case be 5% of the net value of the minerals produced: the Commissioner is not allowed to first appraise the value of the mineral leasehold to determine its true value, and has no discretion whatsoever to vary the royalty rate for different minerals or varying qualities of ore. Moreover, the Commissioner must calculate the royalty as a percentage of the "net value" of the minerals: that is, the value *after* deduction of various costs of processing, transportation, and taxes. Where these costs exceed the gross mineral value, the "net value" - and consequently the royalty - is zero. Thus, as the court below found, under § 27-234(B) "it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever." Petition at 26a.

According to the Arizona Auditor General, Arizona is the *only* state with a fixed, non-negotiable royalty

rate for mineral leases. Petition at 25a. In other states, royalty rates are set through competitive bidding, administrative regulation, or case-by-case negotiation. See, e.g., Cal. Pub. Res. Code §§ 6895, 6897 (West Supp. 1987); N.M. Stat. Ann. §§ 19-8-14, -22, -33 (Supp. 1985); Okla. Stat. Ann. tit. 64, §§ 454, 455, 458 (West 1964); S.D. Codified Laws Ann. §§ 5-7-11.1, -12 (1985); Tex. Nat. Res. Code Ann. §§ 32.1071, -.1073 (Vernon Supp. 1988); Wyo. Stat. § 36-6-101 (Supp. 1987). Moreover, other states avoid the outright giveaway of trust minerals by either requiring minimum royalty payments or calculating royalties as a percentage of gross mineral value. See, e.g., Petition at 26a; Cal. Pub. Res. Code § 6895 (West Supp. 1987). Texas Nat. Res. Code Ann. § 32.1073 (Vernon Supp. 1988); Utah Code Ann. § 65-1-18.

Petitioners correctly note that Congress imposed more stringent trust restrictions on Arizona than on previously admitted states. However, the reason for the tougher restrictions on Arizona was not merely - as petitioners assert - that previously admitted states had allowed school lands to be "diverted to other uses." Congress was primarily concerned that trust resources in other states were being sold "at unreasonably low prices," thereby depriving the beneficiaries of the "full benefit" of the grant. *Lassen v. Arizona*, 365 U.S. 458, 464, 589 (1967). Accordingly, the Arizona Enabling Act specifically prohibited the disposal of trust lands, leaseholds, and other products without prior appraisal and for less than their "true value." Arizona Enabling Act of

1910, Pub. L. No. 219 (Ch. 310), 36 Stat. 557 § 28 (Enabling Act).¹

Petitioners also mislead in asserting that the Jones Act "did not amend the New Mexico-Arizona Enabling Act . . . or any other state's enabling act." Petition at 4. The enabling acts for Arizona and other western states granted to the states specified numbered sections for school trust purposes, except where those sections were mineral in character. The Jones Act expressly amended those enabling acts by providing that "the several grants to the states of numbered sections in place for the support or in aid of common or public schools . . . are, extended to embrace numbered school sections mineral in character." 43 U.S.C. § 870 (emphasis added). The statute further provided that the grant of mineral sections "shall be of the same effect" as the prior grants. 43 U.S.C. § 870(a).

Regarding the proceedings below, respondents did not allege in their complaint - as petitioners imply - that the royalty statute violated the Enabling Act's

¹ Petitioners incorrectly paraphrase the Enabling Act as imposing restrictions "on how Arizona (and New Mexico) could dispose of the nonmineral lands and surface assets that were granted to them by that act." Petition at 3. The actual language of the Enabling Act does not limit the trust restrictions to nonmineral lands and surface assets: rather, it applies the true value and appraisal requirements to "[a]ll lands, leaseholds, timber, and other products of land." Enabling Act § 28. Likewise, the Act declares that "[d]isposition of any of said lands, or any money or thing of value directly or indirectly derived therefrom . . . in any manner contrary to the provisions of this Act shall be deemed a breach of trust." *Id.* (emphasis added).

public auction requirements. The complaint sought invalidation only of the statutory royalty formula, and did not address Arizona's procedures for granting leases. Likewise, the Arizona Supreme Court did not address whether public auction of mineral leases is required. The public auction issue, therefore, is simply not before this Court.

Finally, respondents note that even the lone dissenting justice in the Arizona Supreme Court agreed that "mineral lands are included in the corpus of the state trust properties" and the state is under fiduciary duty to maximize revenues therefrom. Petition at 33a-34a. He did not at all support the proposition that the legislature has totally unfettered discretion to dispose of trust mineral assets as it wishes.

REASONS FOR DENYING THE WRIT

The decision below addresses a problem unique to Arizona under constitutional and statutory provisions unique to Arizona. The mineral royalty statute struck down by the Arizona Supreme Court sets a fixed, non-negotiable royalty rate for all minerals on all school trust lands, and in some cases mandates the outright giveaway of trust minerals. No other state limits trust royalties in this manner. Moreover, the court below struck down the royalty statute based not only on its reading of the Jones Act, but also on specific 1951 amendments to the Arizona Enabling Act expressly exempting *only* oil and gas leases from the trust's prior

appraisal requirement. Likewise, the court's construction of the Jones Act is unlikely to disrupt settled trust practices in other states: the court simply held that the Act subjected minerals to the same trust requirements imposed by the respective enabling acts on trust assets generally. Thus, the decision below does not in any way suggest that Arizona's more stringent trust requirements must apply in other states - instead, the case simply suggests that minerals are subject to whatever trust requirements each state already has.²

1. Petitioners assert that the decision below conflicts with *Jensen v. Dinehart*, 645 P.2d 32 (Utah 1982). That case, however, is simply not analogous. In *Jensen*, the sole question before the court related to the proper disposition of the *proceeds* of mineral leases of school lands - not the royalties that should be charged. The dispute in the case arose because, after passage of the Jones Act, Utah began placing all of its trust mineral revenues in a currently expendable fund rather than in the perpetual fund established under the original Enabling Act (from which only the interest could be

² Petitioners assert that the decision below will cause uncertainty in state land management in other western states, citing as examples, Idaho, Montana and Washington. Yet these states, for all practical purposes, already treat minerals as trust assets - generally allowing the state land agency to set appropriate royalty rates and offer mineral leases at public auction. See, e.g., Idaho Code § 47-704 (Supp. 1987); Mont. Code Ann. §§ 77-3-101, -116, 77-2-321 (1987). Accordingly, petitioners' assertion that the decision below will have "an unsettling effect" on leasing systems in these states is at best blind speculation.

used for current expenditures). The Utah Supreme Court simply held, that under the terms of the Jones Act, it was permissible for the state to deposit mineral proceeds in the currently expendable account.

Contrary to petitioners' suggestion, the court in *Jensen* did not hold that minerals were free from all trust restrictions. In reaching its decision, the court cited language in the Jones Act specifically addressing the disposition of mineral *proceeds*: in particular, the provision stating that "the proceeds on rentals and royalties" from mineral leases were "*to be utilized for the support or in aid of the common or public schools.*" 645 P.2d at 34 (emphasis added by the court). The Utah Supreme Court read this explicit language as to disposition of proceeds - which is somewhat less restrictive than the perpetual fund provision in the original Utah Enabling Act - as controlling with respect to minerals.³ The *Jensen* decision has never been cited by another court for the much more expansive proposition urged by

³ Petitioners misleadingly quote the decision as holding that the Jones Act "left Utah '[a]s a sovereign state . . . free and unfettered' to manage its mineral leasing program for the support of its public schools unencumbered by the highly restrictive provisions of the Enabling Act that governed proceeds from non-mineral school lands and surface assets." Petition at 8. In reality, the portion of the decision being quoted simply stated: "As a sovereign state, it [Utah] was free and unfettered to place mineral proceeds from the school sections in the Uniform School Fund." 645 P.2d at 35. Nowhere does the court state that the Jones Act freed Utah's mineral leasing program from all of the provisions of that state's enabling act.

petitioners - namely, that the Jones Act freed mineral lands from *all* trust restrictions.⁴

In reality, the opinion below is fully consistent with a long line of decisions rigorously enforcing the school land trusts. *See, e.g., Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976); *Lassen v. Arizona*, 385 U.S. 458 (1967); *Ervien v. United States*, 251 U.S. 41 (1919); *State ex. rel. Ebke v. Board of Educational Lands*, 47 N.W.2d 520 (Neb. 1951). Courts in western states have uniformly rejected efforts to circumvent school trust restrictions or waste trust assets. *See, e.g., Gladden Farms, Inc. v. State*, 633 P.2d 325 (Ariz. 1981); *Department of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985); *Oklahoma Education Association v. Nigh*, 642 P.2d 230 (Okla. 1981); *Fox v. Kneip*, 260 N.W.2d 371 (S.D. 1977); *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984). Thus, the decision below is hardly a startling development or change in direction.

2. Petitioners strain to characterize the decision below as creating a conflict in federal-state relations. The "conflict" is wholly imaginary. This is a straightforward case of enforcing the explicit terms and conditions of an express trust - terms and conditions that have been specifically accepted by the State of Arizona in its Constitution and statutes. Ariz. Const. Art. 10 § 1; Ariz. Rev. Stat. Ann. § 37-710. The two principal cases

⁴ Indeed, for royalty purposes, Utah treats minerals as trust assets. Royalty rates are set by regulation and adjusted when "in the best interest of the trust." Utah Admin. R. 632-20-10.2. Some mineral lands are leased at public auction. *Id.* R. 632-20-15, -16.

relied on by petitioners on this point are both totally inapplicable: One involved imposition of conditions under a non-trust federal grant program, and the other involved the traditional federal deference to states in setting criminal laws. *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981); *United States v. Bass*, 404 U.S. 336 (1971). The rule of construction with respect to school land grants to the states is unambiguous: All doubts must be resolved *in favor of* protecting and preserving trust purposes. *United States v. New Mexico*, 536 F.2d 1324, 1326-27 (10th Cir. 1976). Clearly, trust purposes are not served by allowing the state to literally give away trust assets.

The claim of state-federal conflict carries a particularly hollow ring in this case. The decision below was entered by a state court - not a federal court - under provisions of *both* the state constitution and the federal Enabling Act.⁵ Even more significant is the fact that the State of Arizona, although a party below, is not seeking review of the Arizona Supreme Court's decision. Nor has the state chosen to participate as amicus curiae in support of the petition for certiorari. Clearly,

⁵ Contrary to petitioners' assertion (Petition at 7 n.1), the Arizona Constitution does provide an independent and adequate state law ground for the decision below. The Arizona Supreme Court plainly struck down the mineral royalty statute under *both* the Arizona Constitution and the Enabling Act. Petition at 2a, 24a, 27a, 29a. Even if the Enabling Act did not require application of trust restrictions to minerals, there is nothing to prevent Arizona from construing its own Constitution as so mandating.

the state does not see the decision below as an unwarranted interference with its sovereign rights.

3. Petitioners complain that the decision below "upsets years of settled private expectations and unravels longstanding state policy." The assertion is both completely irrelevant and totally inaccurate. As this Court recently held, claims by private parties of "settled" expectations to interests in state lands are entitled to no weight where those expectations are not reasonable. *Phillips Petroleum Co. v. Mississippi*, 108 S. Ct. 791, 798-99 (1988). Here, Arizona mining interests had absolutely no right to expect that the statutory royalty formula would remain unchanged in perpetuity. This would be true even if there were no school land trust at all. Nor could such persons possibly claim a reasonable expectation that the statutory royalty formula would be upheld by the courts. The issue had been only once before addressed by an Arizona appellate court, and that court specifically indicated that a statutory limitation on royalties would be unconstitutional. *State Land Department v. Tucson Rock and Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85 (1970), vacated on other grounds, 107 Ariz. 74, 481 P.2d 867 (1971).⁶

⁶ Petitioners also rely on the fact that the Attorney General of the United States has never contested Arizona's mineral royalty statute even though the Enabling Act specifically authorizes him to do so. But the Enabling Act makes clear that the grant of enforcement authority to the Attorney General shall not "be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act." Enabling Act § 28. Accordingly, no one can presume the validity of a state leasing practice merely because the Attorney General does not choose to challenge it.

4. The opinion below thoroughly explains why the trust restrictions necessarily apply to minerals, and why petitioners' contentions to the contrary are meritless. The Jones Act "extended" the original school trust grant to include mineral lands, and expressly provided that this grant "shall be of the same effect"⁷ as the original grants. 43 U.S.C. § 870(a). In so directing, Congress clearly intended that mineral lands "should be held for the school trust purposes and under the same trust and dispositional restrictions" as the previously vested nonmineral sections. Petition at 10a. Because the Arizona Enabling Act imposed its trust restrictions on "[a]ll lands, leaseholds, timber and other products of land", mineral lands became subject to the trust restrictions as soon as they vested under the 1927 Act. *Id.*⁸

In authorizing the leasing of mineral lands "as the state legislature may direct" or in such "manner" as the

⁷ Petitioners assert that the quoted language is merely a reference to the nature of the actual grant of land - that is, the type of property interests conveyed to the state. Petition at 11. Such a construction is totally unsupportable, however because the "type of property interest conveyed" is expressly defined in other provisions of the Jones Act. See, e.g., 43 U.S.C. §§ 870(b), (c), & (d). Petitioners' reading of the "same effect" clause would render that language little more than meaningless and irrelevant surplusage.

⁸ Page 10a of the Petition for Certiorari - a reprint of the Arizona Supreme Court's decision - contains a typographical error. On the fourth line from the top of the page, the word "not" should read "now". *Kadish v. Arizona State Land Department*, No. CV-86-0238-T, slip op. at 12 (Ariz. Sup. Ct. Dec. 10, 1987).

legislature may direct, Congress was plainly not freeing minerals from the trust restrictions. Courts have consistently construed such language as granting *only* the authority to establish leasing forms and procedures: not to obliterate trust restrictions. Petition at 14a; *State Land Department v. Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970), vacated on other grounds, 107 Ariz. 74, 481 P.2d 867 (1971); *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 237 (Okla. 1982). The contrary construction urged by petitioners would exempt more than just mineral leases from the trust. Under the Arizona - and other - enabling acts, the legislature is also authorized to determine the "manner" of grazing, agricultural, commercial, and domestic leases. Yet Congress clearly did not intend to exempt all of these leases from the trust restrictions. See *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976).

The 1951 amendments to the Arizona Enabling Act provide an added and independent basis for concluding that the Act's trust restrictions apply to minerals. Under those amendments, Congress explicitly authorized oil and gas leases on school trust lands "with or without advertisement, bidding, or appraisement." Petition at 19a. No such express exemption was provided for any other leases, including mineral leases. As the court below concluded, the language of these amendments makes clear that Congress fully intended to apply the prior appraisal requirement to mineral leases.

5. This Court has already addressed the applicability of trust restrictions to leases in *Alamo Land &*

Cattle Co. v. Arizona, 424 U.S. 295 (1976). There, the Court expressly found that the Arizona Enabling Act prohibits "the initial setting of lease rentals at less than fair rental value." *Id.* at 304-05 (emphasis added). Although the case involved a grazing lease, the material provisions of the Enabling Act are the same: both grazing and mineral leases are authorized "in such manner" as the legislature may prescribe. The fact that the Court did not dwell upon the "in such manner" language or discuss the Jones Act is of absolutely no consequence - the Court plainly concluded from the overall context of the Enabling Act that leases were subject to the appraisal and true value requirements. In seeking a different result here, petitioners are asking this Court to upset long-standing and well-settled precedent.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 87-1661

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ASARCO INCORPORATED, CAN-AM CORPORATION,
MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of the State of Arizona

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

As is demonstrated in the petition, the Supreme Court of Arizona has decided an important question of federal-state relations that has not been, but should be, settled by this Court. Respondents' brief in opposition does nothing to undermine that showing.

1. Respondents repeatedly mischaracterize the issue presented. It is not whether the revenues obtained from the lease of mineral lands granted to the State of Arizona should be held in trust for the benefit of the state's public schools or whether the state as trustee should administer its leasing program for trust lands in accordance with the purpose of the trust. (See Resp. Br. i, 5,

8, 12.) Such revenues unquestionably are held and exclusively used for the benefit of the school system as was intended, and the lands are administered by the state for the benefit of the public schools. The issue is whether the restrictions in the Enabling Act of 1910 that Congress imposed on the disposition of nonmineral lands granted to the State of Arizona apply as well to the lease of mineral lands that Congress did not grant to the state by that act. The most significant of these restrictions is a requirement that “[a]ll lands, leaseholds, timber, and other products of land, before being offered,” be appraised to determine their “true value” and that no disposition be made for less than the value so ascertained. Pub. L. No. 219 (ch. 310), § 28, 36 Stat. 557, 574 (Pet. 51a).

In the Jones Act of 1927, which constitutes the grant of mineral lands to the western states, Congress provided that mineral deposits “shall be subject to lease by the State as the State legislature may direct.” Pub. L. No. 570 (ch. 57), § 1, 44 Stat. 1026, *codified as amended at 43 U.S.C. § 870* (Pet. 46a). Respondents’ essential claim—that the legislature has failed to realize sufficient revenues from mineral leases—is thus properly directed to the legislature, which in establishing the royalty rate for mineral leases may properly consider such factors as the disincentive that higher or variable rates might have on mineral exploration. Respondents’ contention provides no basis for denying that the legislature has the leasing authority Congress so plainly conferred on it or for limiting that authority by restrictions that Congress chose to impose only on the disposition of non-mineral lands and surface assets which, unlike mineral deposits, typically can be appraised without lengthy and costly exploration and development.

Similarly, respondents’ effort to portray the Arizona leasing system as a give-away is wide of the mark. (Resp. Br. i, 3, 5.) As is shown in the petition (Pet. 5),

the mineral leases authorized by state statute for up to twenty years are a source of substantial revenues to the state. Moreover, despite respondents’ suggestion to the contrary (Resp. Br. 2), the Supreme Court of Arizona specifically stated that there was no evidence that Arizona’s use of a net value basis for calculating the amount of royalties due ever resulted in mineral extraction without any payment to the state (Pet. 26a), even when a mineral deposit is unimportant. Beyond that, however, the responsibility for deriving appropriate revenues from mineral leases was precisely what Congress determined, in enacting the Jones Act, could be best discharged by the Arizona legislature, and the legislature of each of the western states, taking fully into account local resources and mining conditions.¹

2. As respondents acknowledge (Resp. Br. 3), the various states have adopted a broad range of leasing methods. It was the clear congressional purpose in the Jones Act that the choice among methods should be that of each state rather than a centralized determination by the federal government. It was only with respect to non-mineral lands that Congress chose to impose specific dispositional restrictions. If followed by other courts, the decision of the court below could strip other western states of their broad leasing authority under the Jones Act and require them to observe dispositional restrictions that Congress believed appropriate only for non-mineral lands. Respondents’ claim that those other potentially affected western states already treat mineral lands as trust lands (Resp. Br. 6, n.2) is not responsive

¹ The Arizona Legislature recognized that in order to induce miners to prospect for, explore and develop mineral deposits on state land, they must be assured that, if successful in discovering a mineral deposit, they will be able to obtain a lease with a set royalty. The present Arizona royalty statutes give a lessee assurance that he may expend money knowing that for the twenty-year term the royalty rate will not change.

to this point. Arizona, too, treats its mineral lands as trust assets, but the decision of the court below goes far beyond that undisputed duty of the state and requires Arizona to follow the very specific dispositional requirements contained in its Enabling Act, including prior appraisal of each particular site before leasing. If extended in similar fashion to other states, such a holding could upset leasing systems involving large amounts of school lands in other western states. (See Pet. 9.)

3. Nothing respondents say about the decision in *Jensen v. Dinehart*, 645 P.2d 32, 35 (Utah 1982), explains away the conflict between the decision of the Utah Supreme Court in that case and the decision of the Arizona Supreme Court in this case over the meaning of the Jones Act. Either that statute grants mineral lands to the states with authority to lease them without regard to the specific restrictions in each state's enabling act applicable to nonmineral lands, as the Utah court held, or it imposes by incorporation those specific restrictions on the lease of mineral lands, as the Arizona court held. Put in other terms, either the Utah court was right in saying that the purpose of the Jones Act, manifested in its grant of authority to lease mineral lands "as the State legislature may direct," was to free mineral-bearing school land sections granted to Utah "from any restriction or limitation that may have theretofore existed, except as to use for public schools," 645 P.2d at 35, or the Arizona court was right in saying that Congress, in providing in the Jones Act that the grant of numbered mineral sections "shall be of the same effect" as prior grants of nonmineral sections, meant to incorporate all those enabling act restrictions and limitations (Pet. 9a-10a). Respondents trivialize the jurisprudence of conflicts in attempting to distinguish the Utah case on the ground that the enabling act limitation it held inapplicable was a requirement that proceeds of the state's disposition of nonmineral lands be put into a permanent

(not currently expendable) school fund while in this case the restriction held applicable was the Enabling Act's requirement of prior appraisal. That is not a difference that makes one decision consistent with the other.

4. Respondents fail to show how the decision of the Supreme Court of Arizona properly interprets the relevant federal acts. The Jones Act, as just noted, expressly authorizes each affected state to lease mineral deposits "as the State legislature may direct," and Arizona's Enabling Act has been amended similarly to relieve mineral leases of the prior appraisal requirement applicable to the disposition of nonmineral school lands (see Pet. 10-16). The language of the Jones Act that "the grant of numbered mineral sections under this Act shall be of the same effect as prior grants" (Pet. 46a) does not derogate in any way from the broad leasing authority conferred on the states by express provision in that act. Congress chose "the same effect" phrase merely to effectuate its intent that full title to mineral lands would pass to the states without federal reservation of rights to the lands or mineral deposits therein, which was a concern of the legislators in framing the act. See, e.g., S. Rep. No. 603, 69th Cong., 1st Sess. 1-7 (1926); Hearings on S. 564 Before the House Comm. on Rules, 69th Cong., 2d Sess. 11, 12, 13 (1926). Contrary to respondents' contention (Resp. Br. 11 n.7), no other provision of the Jones Act conveys that central point. By its use of language expressly permitting state legislatures to direct the manner of leasing mineral lands, Congress clearly intended to give each state broad discretion to impose its own conditions on the leasing of those trust lands so long as the proceeds are used for the benefit of the public schools. (See Pet. 13-14.)

The petition for a writ of certiorari should be granted.

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May 31, 1988

(6) Supreme Court, U.S.

FILED

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No. 87-1661

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ASARCO Incorporated, Can-Am Corporation,
Magma Copper Company, and
James P.L. Sullivan,

Petitioners,

vs.

Frank and Lorain Kadish, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF ARIZONA

RESPONDENTS' OPPOSITION TO
MOTIONS FOR LEAVE TO FILE
BRIEFS AMICUS CURIAE

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Two motions for leave to file briefs
amicus curiae are currently pending in
the above-captioned matter: one by

Phoenix Brick Yard and one by the Alaska Miners Association, Southwestern Minerals Exploration Association, and GSA Resources Inc. Both motions should be denied.

Phoenix Brick Yard has at all times been a member of the defendant class in the litigation below. The class consists of all present and future mineral lessees of state lands. Petition for Certiorari (Petition), Appendix at 3a. All class members were given notice of the litigation at the time of class certification, id. at 40a, but Phoenix Brick Yard chose not to intervene. The interests of the class members have been and are being represented by petitioner ASARCO Incorporated, which was designated as a class representative by the trial court.

Id. at 41a. Accordingly, the filing of an amicus brief by Phoenix Brick Yard would amount to nothing more than double-briefing on behalf of the class.

The same rationale applies to GSA Resources Inc., one of the parties to the second amicus motion. GSA is also a class member that chose not to intervene below and its interests are therefore also being represented by the petitioners in this matter. As for the Southwestern Minerals Exploration Association and Alaska Miners Association, these groups offer viewpoints that are not significantly different from those of the petitioners.

Accordingly, the motions for leave to file amicus curiae briefs should be denied.

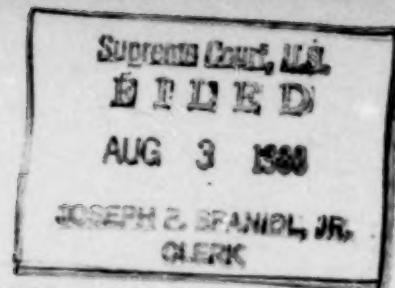
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October Term, 1987

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ON PETITION FOR A WRIT OF CERTIORARI
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No. 87-1661

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Respondents are filing this supplemental brief to draw the Court's attention to the very recent Arizona Supreme Court decision in Deer Valley Unified School District v. Superior Court, _____ P.2d _____, No. CV-86-0577-T (Ariz. S. Ct. June 30, 1988). There, the court made absolutely clear that the Arizona Constitution establishes a totally independent basis for imposing trust restrictions on the disposition of state school lands.

The case involved an effort by a local school district to condemn trust lands for use as a school building site. The Arizona Supreme Court held that such condemnation was not permissible because it would circumvent provisions in the state constitution requiring that all sales of school trust lands be conducted

via public auction and competitive bidding. In reaching this result, the Arizona Supreme Court conceded that this Court had construed identical requirements for competitive bidding in the Arizona Enabling Act to be inapplicable to land acquisitions by state agencies. Lassen v. Arizona, 385 U.S. 458, 464-65 (1967). The Arizona Supreme Court held, however, that it was free to construe the state constitution as providing even greater protection for trust lands than the Enabling Act.

The language used by the court in Deer Valley makes abundantly clear that Arizona courts construe the state constitution as providing a completely independent set of school trust restrictions that are even more protective than those in the Enabling Act:

The framers of our constitution . . . went beyond mere acceptance of the terms and benefits of a federal statute. They independently replicated the essential restrictions of the Enabling Act in Article X of the Arizona Constitution.

Thus, at all times since Arizona joined the Union, there have been two complementary levels of protection against improvident state legislative or executive disposal of Arizona's school trust land.

The Enabling Act, as interpreted in Lassen, merely sets out the minimum protection for our state trust land. We independently conclude that our state constitution does much more.

Deer Valley, slip op. at 6, 7, 12.

In the instant case, the Arizona Supreme Court struck down the state's mineral royalty statute under both the Arizona Constitution and the Enabling Act. See Petition at 2a, 24a, 27a, 29a. In light of the Deer Valley decision, it is apparent that the Arizona Supreme Court would continue to view the royalty

statute as unconstitutional even if this Court were to uphold the statute under the Enabling Act. Under these circumstances, there is plainly an independent and adequate state law ground for the decision below, and this Court accordingly lacks jurisdiction to grant review. Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). The Petition for Certiorari should be denied.

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No. 87-1661

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION,
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Petitioners,
v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

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IN THE
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Respondents.

On Petition for a Writ of Certiorari to the
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SUPPLEMENTAL BRIEF FOR PETITIONERS

This brief responds to the brief filed by the Solicitor General for the United States as amicus curiae. While the Solicitor General concludes that the petition for a writ of certiorari should be denied, the considerations advanced in support of that conclusion serve to confirm that, to the contrary, this Court should review at this time the decision of the Arizona Supreme Court on an important issue of federal-state relations.

Standing. The Solicitor General first suggests that the respondents, who initiated this litigation and prevailed in the court below, do not satisfy the standing requirement

of Article III and that accordingly this Court is constitutionally barred from reviewing, at the behest of the petitioners, a decision in favor of the respondents by which the petitioners are unquestionably aggrieved. The Solicitor General is wrong in his description of the interests of the respondents; he is wrong in asserting that their interests do not satisfy the standing requirements of Article III. And, if he were right on those points, he would be wrong in assuring the Court that the perverse consequence must be to decline review and let stand, for want of a plaintiff's Article III standing, a decision of a state court on a federal issue by which the party seeking review is unquestionably aggrieved.

The plaintiffs in this case are named taxpayers and the Arizona Education Association, representing its 20,000 members who are teachers in the Arizona public schools. The taxpayer plaintiffs alleged in the complaint that they pay property taxes that are used to support public education and that the Arizona formula for mineral leases that they challenge has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." (Complaint ¶ III.) The position of these taxpayers is thus far from that of the taxpayer plaintiff in *Doremus v. Board of Education*, 342 U.S. 429 (1952), the only case the Solicitor General cites in which this Court has dismissed for want of jurisdiction an appeal from a decision in a state taxpayer's suit. The plaintiff in *Doremus*, complaining of a statute providing for the reading of verses from the Old Testament in public school, made "no allegation that this activity is supported by any separate tax or paid for from any particular appropriation or that it adds any sum whatever to the costs of conducting the school." *Id.* at 433.

The decision that the plaintiff in *Doremus* had no standing and his appeal must therefore be dismissed was not a broad decision that all state taxpayer suits are beyond this Court's power of review. It was a narrow de-

cision based on the fact that "the grievance which it is sought to litigate here is not a direct dollars-and-cents injury but is a religious difference." *Id.* at 434. The Court indeed said that a taxpayer's action can meet the Article III case-or-controversy test "when it is a good-faith pocketbook action." *Id.*

In this case the taxpayer plaintiffs alleged just the kind of direct dollars-and-cents injury necessary to make their case a good-faith pocketbook action that qualifies as a case or controversy under Article III. The allegation of their complaint is that they are paying higher taxes as a direct consequence of the governmental action they challenge. They are like the plaintiff in *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court found a justiciable controversy. As the Court explained in *Doremus*, the plaintiff in *Everson* "showed a measurable appropriation or disbursement of school-district funds occasioned solely by the activities complained of," the spending of public funds for transportation of parochial school students. 342 U.S. at 434.

True enough, many, probably most, potential federal taxpayer suits are outside of Article III under this Court's current doctrine. But the leading opinions establishing the no-standing doctrine and its limits make clear that they deal only with federal taxpayers. See *Massachusetts v. Mellon*, 262 U.S. 447, 486-87 (1923); *Flast v. Cohen*, 392 U.S. 83, 101, 102, 104, 105-06 (1968). *Doremus*'s placement of the state taxpayer's "good-faith pocketbook action" within Article III has never been questioned by the Court. And *Everson* has been cited by the Court (along with cases decided since *Flast v. Cohen*) as among "the numerous cases in which we have adjudicated Establishment Clause challenges by state taxpayers to programs for aiding nonpublic schools." *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 380 n.5 (1985).

All of this is aside from the separate interest of the members of the plaintiff Arizona Education Association. The Solicitor General misconceives both their grievance and the likelihood of its being remedied by their lawsuit. The federal statute that is at the heart of this lawsuit provides that all revenue obtained from lands granted by the federal government be dedicated to the support of the Arizona school system. The 20,000 teacher members of the Association unquestionably have a direct and personal interest in the welfare of that system. The injury they claim from the alleged disregard of the federal statute does include an adverse economic impact on them as the Solicitor General quotes from the complaint. (S.G. Br. 9-10.) That is certainly an acceptable allegation of direct injury. The complaint alleges also that the "quality of education in Arizona" has been adversely affected by the failure to follow the Association's view of what federal law requires. (Complaint ¶ IV.) These allegations on behalf of the Association members satisfy the constitutional "core component" of the standing requirement, i.e., that "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The injury is plain enough. The likelihood of redress is present also, contrary to what the Solicitor General says. Experience shows that the availability of additional financial support will enhance the quality of education through increased teacher salaries and otherwise. Nothing in the law of standing requires the respondents to provide a detailed blueprint of how the enhancement would come about and precisely how it would benefit them as the price of their admission to the courthouse.

There is no question that this has been a sharply and vigorously contested lawsuit. Both sides believed that they were asking the Arizona courts to resolve a genuine dispute, and those courts would be surprised to learn

that they had rendered a mere advisory opinion, even one that is advisory "for Article III purposes" only. (S.G. Br. 10.) The decision, if not reviewed here now, will surely be accorded dispositive effect by those courts and is likely to prompt a conforming amendment to the Arizona leasing statute, codifying in state law an erroneous interpretation of federal law and thereby mootng the petitioners' case. Moreover, any effort by the petitioners at some time in the future in a federal court to relitigate the issue decided by the court below would be at best an uphill battle. Because the petitioners have had a full and fair opportunity to present their contentions, collateral estoppel or issue preclusion will surely be argued as a bar to relitigation. Cf. *Federated Department Stores v. Moitie*, 452 U.S. 394 (1981).

Against all this, the Solicitor General offers only a comment of the Court in *Doremus*: "we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute" a case or controversy. 342 U.S. at 434 (S.G. Br. 10). There has never been occasion for the Court to expand upon this remark, which was made in the context of a case in which a plaintiff who lacked Article III standing had lost on the merits in the state courts. Eminent authority, as the Solicitor General recognizes (S.G. Br. 11 n.4), considers it reasonable to believe that the Court meant that, while dismissing the appeal of that plaintiff, it would vacate the judgment below in such a case as the Solicitor General hypothesizes this one to be, where the plaintiff without standing has prevailed on the merits, to prevent a state court's disposition of the federal issue from being conclusive. The Solicitor General says he disagrees and thinks the Court meant only that it would not consider itself concluded by an unreviewed decision and would review a subsequent decision rendered in a constitutional case or controversy, if the non-prevailing party could contrive

to obtain one. That is small solace to such a party, especially when, as we have said, the whole issue may be concluded by conforming legislative action. The question what the rule should be is a significant one.

In the circumstances, if the Court believes that there is anything to the Solicitor General's standing argument, it should invite the parties to brief and argue the standing issues, in addition to the merits, on plenary review of the decision below.

Ripeness. The Solicitor General says that review of the Arizona decision by this Court at this time would be premature. (S.G. Br. 11-12.) The statement is made by way of an addendum to the standing argument and is apparently *not* offered as an argument that the decision below is not final and therefore beyond the Court's jurisdiction. Contrary to the Solicitor General's assertion, it is clear that the petitioners will suffer injury if the decision below stands. The Arizona Supreme Court has held unequivocally that the statute pursuant to which the terms of the petitioners' mineral leases are set is "unconstitutional and invalid" and has instructed the trial court to enter judgment to that effect. (App. 29a.) Thus the law pursuant to which the petitioners assert rights as lessees has been unqualifiedly set aside; if the petitioners' view of that law is correct, they have surely suffered injury in fact and in law.

The question on which the trial court has been instructed to take evidence "if appropriate" is not the validity of the governing state statute; that question, as we have shown, is resolved. The permissible taking of evidence, on which the Solicitor General mistakenly relies in urging prematurity (S.G. Br. 12), relates entirely to "special action relief" which the respondents sought from the trial court. The petition does not seek review of any such relief. The case is not brought here prematurely.

The Merits. In giving his blessing to the decision of the Supreme Court of Arizona the Solicitor General essen-

tially restates the reasons advanced by that court and urged by the respondents.

All but ignored in his analysis is the Act of 1927, the Jones Act, by which for the first time lands known to be mineral-bearing were conveyed to the western states, including Arizona. By that statute, states were forbidden to sell the minerals or the right to prospect for, mine, and remove them; all sales of mineral-bearing lands must reserve to the state the mineral deposits and prospecting and mining rights. It was unquestionably the ability of Arizona to dispose in fee of the non-mineral bearing lands granted it by the Enabling Act of 1910 that gave rise to the appraisal, advertisement and auction limitations that Congress imposed in that act. When mineral lands were first granted to the state some seventeen years later, no such limitations were imposed on the state and there is no evidence they were considered necessary. Instead, the statute authorized Arizona and the other states to lease the mineral deposits in the newly granted mineral-bearing lands "as the State legislature may direct." The requirement that the state retain title to the minerals in mineral-bearing lands made unnecessary the specific limitations of the Enabling Act designed to protect against improvident sales. There was never any "sad experience" in the utilization of mineral lands by the states such as led the Congress to impose limitations with respect to non-mineral lands where there had been "dissipation of the funds by one device or another." (S.G. Br. 4.)

The Solicitor General, as we have said, disdains the Jones Act with its specific provision that mineral deposits may be leased as the state legislature may direct. He quotes the comparable phrase in Section 28 of the Enabling Act as it was amended in 1936 to make the treatment of lands that had passed to Arizona under the Enabling Act because their mineral-bearing nature was unknown accord with the treatment of the known mineral-

bearing lands granted to the state by the 1927 act. He says that phrase—"in such manner as the Legislature of the State of Arizona may prescribe"—can reasonably be read merely "as authorizing the legislature to set lease terms not in conflict with the express terms of the Enabling Act." (S.G. Br. 12.) That is not a sensible reading even of the Enabling Act phrase. The phrase is a part of a sentence that states, "Nothing herein contained shall prevent," among other things, the leasing of lands for their mineral deposits in such a way as the legislature prescribes. It is hard to imagine a clearer direction that the express terms "herein contained"—the appraisal, fair value and auction terms contained in the Enabling Act and specifically in Section 28—do not qualify the legislature's authority to lease mineral deposits as its own view of sensible policy dictates.

So far as the comparable phrase in the Jones Act is concerned, the Solicitor General's argument is not plausible. In the same sentence of the Jones Act by which Congress authorized each grantee state to lease mineral deposits "as the State legislature may direct," it directed that the proceeds of the leases be used "for the support or in aid of the common or public schools." No such direction as that would have been necessary had Congress not thought itself to be enacting a self-contained regime for state leases of the newly granted mineral deposits. For the Arizona Enabling Act and the enabling act of other states affected by the Jones Act already specified that proceeds of the disposition of the lands granted to the new states must be used to support the public schools.

The Conflicting Decision. In *Jensen v. Dinehart*, 645 P.2d 32, 35 (Utah 1982), the Utah Supreme Court held that the Utah legislature could, under the terms of the Jones Act, direct that the proceeds of leases of mineral deposits be used for current school support. The Utah Enabling Act required that proceeds of sales or

other dispositions of federally granted lands go into a fund, interest on which only could be used currently for school support. The Solicitor General acknowledges "tension" between that decision and the decision below (S.G. Br. 14) but denies a square conflict (*id.* at 8) apparently because the Utah case concerned the effect of the Jones Act on restrictions in the Utah Enabling Act and this case concerns the effect of the Jones Act on restrictions in a section of the New Mexico-Arizona Enabling Act. That is not the kind of distinction that makes a conflict of decisions less than a square conflict. The conflict should be resolved and the important question of federal law on which the highest courts of two states differ decided by this Court.

The Arizona Constitution. The Solicitor General ends on a note of high speculation: Even if the Jones Act did give the State of Arizona leasing powers free of the Enabling Act's restrictions, as the petitioners contend, review is not warranted, he suggests, because the state court may ultimately determine that those same restrictions are imposed by the Arizona State Constitution. (S.G. Br. 15.)

He does not contend that the decision below rests on an adequate independent state ground so as to deprive this Court of jurisdiction; he acknowledges that the decision rests primarily on federal law. (S.G. Br. 15 n.9.) (In fact, the decision plainly rests exclusively on an interpretation of federal laws.) He points out, however, that in a totally unrelated case decided earlier this summer, which involved neither leasing nor mineral lands, the Arizona Supreme Court held that, even though the Enabling Act did not require advertising and auction when the state condemned granted lands, the identical language in the Arizona Constitution did impose such requirements. *Deer Valley Unified School District No. 97 v. Superior Court*, No. CV-86-0577-T (Ariz. S. Ct. June 30, 1988).

The Solicitor General appears to be suggesting that, even though the decision below rested on federal law, it might be regarded, because of *Deer Valley*, as reflecting the requirements of the Arizona Constitution. The court below, however, did not find any difference between the requirements of the Enabling Act, as amended, with respect to mineral leases and the requirements of the rescripted Arizona Constitution, and differences are just what it did find in *Deer Valley*. The Arizona Supreme Court gave no hint in this case that, if disabused of an error in its reading of the federal law, it would adhere to its reading of the nearly identical provision of the Arizona Constitution. Its decision, therefore, is an application of federal law and should be reviewed as such regardless of speculation that the Arizona courts might do something on remand that they have not suggested they would do.

CONCLUSION

The decision of the court below warrants plenary review by this Court.

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In the Supreme Court of the United States
OCTOBER TERM, 1988

ASARCO INCORPORATED, ET AL., PETITIONERS

v.

FRANK AND LORAIN KADISH, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Arizona Supreme Court correctly concluded that Section 28 of the New Mexico-Arizona Enabling Act prohibits the leasing of mineral lands held in trust for the benefit of the state's public schools at less than the appraised true value of the lease.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1661

ASARCO INCORPORATED, ET AL., PETITIONERS

v.

FRANK AND LORAIN KADISH, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In Section 24 of the New Mexico-Arizona Enabling Act of 1910, ch. 310, 36 Stat. 572-573, Congress provided that "sections two, sixteen, thirty-two, and thirty-six" "in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools." Arizona thereby received more than eight million acres of "school trust lands" (Pet. App. 4a). Section 24 stated that "mineral" lands did not pass to the state, but provided that Arizona could obtain other lands in lieu of mineral lands. Under *United States v. Sweet*, 245 U.S. 563, 572 (1918), and *Wyoming v. United States*, 255

U.S. 489 (1921), the mineral lands that did not pass to Arizona were lands known in 1910 to contain minerals; lands on which minerals were subsequently discovered passed to the state by the Enabling Act.

The distinction the Court drew between lands known to contain minerals on the date of the grant and lands on which minerals were subsequently discovered led to numerous title disputes in the many western states to which Congress had granted lands to be held in trust for the benefit of the public schools. In order to settle such disputes, Congress, by the Act of January 25, 1927, ch. 57, § 1, 44 Stat. 1026-1027, extended the original grants to cover mineral lands as well. This Act, known as the Jones Act, provided that its grants of mineral lands "shall be of the same effect as prior grants." Jones Act, subsection (a). The Act provided that any sale of these lands must contain a reservation of minerals to the state, but empowered the states to lease the lands "as the State legislature may direct," with the proceeds of the leases "to be utilized for the support or in the aid of the common or public schools." Jones Act, subsection (b).

Section 28 of the New Mexico-Arizona Enabling Act (36 Stat. 574-575) currently provides, as it has always provided, that the school trust lands "shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction * * *, notice of which public auction shall first have been duly given by advertisement," and that "[a]ll lands [and] leaseholds * * * shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained." As amended in light of the Jones Act in 1936 and to establish special rules for oil and gas leases in 1951, it also provides that "[n]othing herein contained shall prevent" leases of three types. First, the lands may be leased for non-mineral purposes, "in such manner as the Legislature of the State of Arizona may prescribe,"

for ten years or less. Second, the lands may be leased for mineral purposes other than the production of oil, gas, and hydrocarbon substances, "in such manner as the Legislature of the State of Arizona may prescribe," for 20 years or less. Third, the lands may be leased for the production of oil, gas, and other hydrocarbon substances, "in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe," for 20 years or less.

Article 10 of the Arizona Constitution, which "is 'practically a rescript of section 28 of the Enabling Act'" (Pet. App. 5a, quoting *Murphy v. State*, 65 Ariz. 338, 348, 181 P.2d 336, 342 (1947)), incorporates the appraisal, advertisement, and auction provisions of Section 28 of the Enabling Act. The Arizona Constitution goes beyond the Enabling Act by subjecting "all lands otherwise acquired by the State," not just the school lands granted to the State by the Enabling Act, to its restrictions (art. 10, §§ 1, 9).

2. The Arizona statute governing mineral leasing on public lands provides "for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim" (Ariz. Rev. Stat. Ann. § 27-234(B) (1976 & Supp. 1987)). "Net value" is further defined as the gross value of the minerals after processing minus production costs, transportation costs, and taxes (*ibid.*). The statute does not provide for appraisal or require that the state receive, at the least, the value ascertained by an appraisal. Since deductible costs may exceed the gross value of the minerals produced, it is possible that no royalty will be paid (Pet. App. 26a).

Several individual taxpayers who claim that their taxes support public education in Arizona and the Arizona Education Association, which represents approximately

20,000 public school teachers throughout the state, brought this suit in state court against the appropriate state offices and a mining company seeking a declaration that Ariz. Rev. Stat. Ann. § 27.234(B) (1976 & Supp. 1987) is void. More specifically, they contended that the statute is inconsistent with the requirement that state lands be appraised and leased at the value ascertained by the appraisal. A number of mining companies intervened and contended that Section 28 of the Enabling Act and Art. 10, § 3 of the Arizona Constitution, which, following the Jones Act, provide for the leasing of mineral lands "in such manner as the Legislature of the State of Arizona may prescribe," authorize the legislature to provide for leasing without regard to the appraisal requirement. The plaintiffs, in response, contended that that language authorizes the legislature to determine "the procedure of leasing" but does not authorize it to avoid the "prior appraisal requirements" (Pet. App. 38a). The trial court recognized that "there is strong language in *Alamo Land and Cattle Company Inc. v. Arizona*, 424 U.S. 295 (1976) which indicates that prior appraisement is necessary before leases shall be given," but nevertheless granted the mining companies' motion for summary judgment (Pet. App. 39a).

3. The Supreme Court of Arizona reversed (Pet. App. 1a-36a). It first noted the "sad experience" that led Congress to enact the strict trust terms of the New Mexico-Arizona Enabling Act (Pet. App. 5a-6a (quoting *Murphy*, 65 Ariz. at 351, 181 P.2d at 344)). Of the 23 states that had previously been granted lands, the "dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state" by 1910 (*ibid.*). Through the New Mexico-Arizona Enabling Act, Congress "intended to severely circumscribe the power of state government to

deal with the assets of the common school trust" (Pet. App. 6a). The court noted (Pet. App. 20a) that in *Lassen v. Arizona ex rel. Arizona Highway Department*, 385 U.S. 458, 463, 466 (1967), this Court observed that "[t]he central problem which confronted the [Enabling] Act's draftsmen was * * * to devise constraints which would assure that the trust received in full fair compensation for trust lands," and they solved this problem by "unequivocally demand[ing] * * * that the trust receive the full value of any lands transferred from it."

The court concluded that the mining companies' contention that the 1936 amendment of Section 28 of the Enabling Act (which authorizes mineral leasing "in such manner as the Legislature of the State of Arizona may prescribe") permits the state legislature to avoid the appraisal requirement "is completely contrary to the objectives sought by the restrictive wording of other portions of the Enabling Act" (Pet. App. 14a). As did the courts in *State Land Department v. Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970), vacated on other grounds, 107 Ariz. 74, 481 P.2d 867 (1971), and *Oklahoma Education Ass'n v. Nigh*, 642 P.2d 230, 237 (Okla. 1982), the Arizona Supreme Court concluded that that language "is not an unbridled grant of power that would allow the legislature to avoid the trust restrictions and duties imposed by the entirety of the Enabling Act," but instead grants authority to set lease terms not in conflict with the express terms of the Enabling Act (Pet. App. 15a).

The court further stated that the amendment of Section 28 of the Enabling Act in 1951 reinforced its conclusion that the 1936 amendment of the Enabling Act did not give the Legislature authority to avoid the appraisal requirement. The 1951 amendment added the provision stating that hydrocarbon leases (but not other mineral leases)

could be “made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe.” By that amendment, the court stated, “Congress showed that when it intended to free the state from the dispositional restrictions, it would do so explicitly” (Pet. App. 19a). “Moreover,” the court added (*id.* at 20a), “if Congress did not regard the dispositional restrictions of the original Enabling Act as effective against mineral leases, why did it bother to create specific exemptions in 1951 for oil, gas, and other hydrocarbon leases?”¹

The Arizona Supreme Court also noted that this Court’s decision in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), supported its decision. In that case, the federal government had condemned school trust lands, and a company that had leased some of the condemned lands from Arizona sought an award to compensate it for the fact that the rent it owed the state was less than the fair rental value of the property. In remanding the case for further determinations, the Court questioned the validity of the company’s claim, even though Section 28 of the Enabling Act provides that grazing lands, like mineral lands (other than lands containing oil and gas), may be leased

¹ The Arizona Supreme Court also found support for its construction of Section 28 in Joint Resolution No. 7, a 1928 congressional resolution relating to New Mexico. The resolution stated that New Mexico could amend its constitution to provide that mineral leases on school lands “may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature.” If Congress had generally intended through the Jones Act to authorize the state legislatures to avoid the appraisal, advertisement, and competitive bidding requirements, then, the court concluded, “it would have used explicit language to accomplish that result, just as it did for New Mexico in Joint Resolution No. 7” (Pet. App. 17a).

“in such manner as the Legislature of the State of Arizona may prescribe.” The Court relied on the fact that Section 28 “has a protective provision against the initial setting of lease rentals at less than fair rental value” that “provides that a leasehold, before being offered, shall be appraised at ‘true value’ ” (424 U.S. at 305, 306).² That ruling, the Arizona Supreme Court stated, “seem[s] fully dispositive of the issue” presented in this case (Pet. App. 22a).

Having concluded that “the Enabling Act and its re-scrip in art. 10 of the Arizona Constitution, forbid the state from making nonhydrocarbon mineral leases without appraisal or for less than their true value” (Pet. App. 24a), the court then considered the validity of the state’s mining statute. Because the statute provides that the royalty due is five percent of the net value of the minerals produced, and the deductible costs used to calculate net value may exceed the gross value of the minerals, the court concluded that “under § 27-234(B) it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever” (*id.* at 26a). After adding that “we have no way of knowing from this record whether such circumstances have existed” (*ibid.*), the court remanded with instructions that the trial court enter a judgment declaring the statute

² The Court in *Alamo Land and Cattle Company* further explained that a difference between the “rental specified in the lease and the fair rental value” could arise in one of two ways (424 U.S. at 304). First, it could be that “the lease rentals were set initially at less than fair rental value” (*ibid.*), in which case the lease would be void under Section 28 of the Enabling Act. Second, the lease might initially have been set at the fair rental value; but that value might have increased during the term of the lease (*id.* at 305), in which case the company might be entitled to an award to compensate it for the loss of the lease. The Court remanded with instructions that the lower courts determine how the difference between the rental specified in the lease and the fair rental value arose and enter judgment accordingly (*id.* at 311).

unconstitutional and take further evidence to determine "what further relief is appropriate" (*id.* at 29a).

DISCUSSION

As an initial matter, it appears that the plaintiffs do not satisfy the standing requirements of Article III. In that circumstance, under *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952), the decision below is merely an advisory opinion and this Court lacks jurisdiction to review it. In addition, this case is in an interlocutory posture, and review by this Court would be premature.

In any event, the decision below is correct. While the court in *Jensen v. Dinehart*, 645 P.2d 32 (Utah 1982), viewed the Jones Act as freeing mineral lands from restrictions in enabling acts, which is not how the court below understood that Act, review is nevertheless not warranted. The decision below was based specifically on the meaning of Section 28 of the New Mexico-Arizona Enabling Act, which the court correctly viewed as not allowing the leasing of mineral lands in Arizona at less than appraised "true value" regardless of the effect of the Jones Act in other contexts. The two decisions, therefore, are not squarely in conflict, and the applicability of a decision by this Court in this case would accordingly be quite limited. Moreover, a recent decision by the Arizona Supreme Court, as well as that court's opinion in this case (Pet. App. 24a, 27a), indicate that the result it reached in this case is in any event independently supported by Article 10 of the Arizona Constitution.

1. Had this suit been brought in federal court, it would have been required to be dismissed because the plaintiffs lack standing. The "core component" of standing under Article III is that the plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful con-

duct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982).

It appears that the individual taxpayers here claimed standing as citizens or taxpayers, rather than because their own more specific interests were injured. Compl. para. III. Under Arizona law, taxpayers have standing to seek to enjoin pecuniary loss to the public fisc. *Smith v. Graham County Community College*, 123 Ariz. 431, 600 P.2d 44 (Ariz. App. 1979). Although the courts of the states are not barred by the Federal Constitution from recognizing standing on such a theory, this Court has consistently held that a person does not satisfy the standing requirement of Article III based on nothing more than his status as a citizen or taxpayer who is interested in the conduct of his government. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215-221 (1974); *United States v. Richardson*, 418 U.S. 166, 171-175 (1974); *Doremus*, 342 U.S. at 433-435; *Frothingham v. Mellon*, 262 U.S. 447 (1923); cf. *Allen v. Wright*, 468 U.S. at 754-755, 756 n.21; *Valley Forge*, 454 U.S. at 482, 484-485 n.20. Accordingly, the individual taxpayers lack standing to invoke the jurisdiction of an Article III court.

The Arizona Education Association alleged that "[t]he failure of the defendants to collect the true value on leases of State mineral lands * * * imposes an adverse economic impact on the Association and its members." Compl. para. IV. By that it presumably means that the teachers it represents will receive more pay if it prevails in this suit. It is not at all clear, however, that that result would be "likely" to follow from a favorable decision." *Allen v. Wright*, 468 U.S. at 751 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)). There has been no showing that if the stateulti-

mately receives additional revenues as a result of leasing mineral lands following an appraisal, the state's teachers will receive pay raises they otherwise would not receive.³ It would seem at least as likely that, if additional revenues are received from mineral leases, taxes will be reduced correspondingly or, if additional funds from mineral leases are used to benefit the schools, the benefits will not be in the form of increased teacher compensation.

If the plaintiffs lack standing under Article III, then this Court presently lacks jurisdiction, even though the mining companies may well be injured by the relief to be granted on remand. In *Doremus*, this Court held that while a state court may "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory, * * * [b]ecause our own jurisdiction is cast in terms of 'case or controversy', we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such" (342 U.S. at 434). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 954 & n.4 (1984); *Revere v. Massachusetts General Hosp.*, 463 U.S. 239, 243 (1983). That holding is controlling here if, as we have suggested, the decision below constitutes, at this juncture, an advisory opinion for Article III purposes. If the trial court declares the mining companies' leases void on remand, they would then have standing to challenge that decision in an appropriate action. The prior decision of the Arizona

³ Indeed, as amicus Clinton Campbell Contractor, Inc., suggests (Br. 9), it is not even clear that Arizona will receive additional revenues if the appraisal requirements are followed. If the mining companies' leases were declared void, as the plaintiffs have requested (Pet. App. 38a), then state revenues from mineral leases presumably would decline in the short term.

Supreme Court that the state mining statute is contrary to Section 28 would not bar such an action, since, as this Court stated in *Doremus*, an advisory opinion on the meaning of the Enabling Act cannot be the "basis for conclusive disposition of an issue of federal law" (342 U.S. at 434).⁴ See also our discussion of this question in our amicus brief (at 13-17) in *Alaska Miners Ass'n v. Trustees for Alaska*, cert. denied, No. 87-205 (May 31, 1988).⁵

In addition, this case is in an interlocutory posture and it is not possible at this time to determine whether the mining companies will in fact suffer injury. While Section 28 provides that leases "not made in substantial conformity with the provisions of this Act shall be null and void," it is not clear at this juncture whether any leases will be held void on that ground or what criteria will be utilized to determine "substantial conformity." The Arizona Supreme

⁴ It has been suggested that *Doremus* could be read to mean that dismissal of the petition is appropriate only if the state supreme court rejected the plaintiff's challenge in a proceeding in which the plaintiff did not satisfy Article III's standing requirements, and that this Court properly could vacate a state court decision that sustained the challenge in such a proceeding. See *Barnes v. Kline*, 759 F.2d 21, 63 n.16 (D.C. Cir. 1984) (Bork, J., dissenting), vacated as moot, No. 87-781 (Jan. 14, 1987); L. Tribe, *American Constitutional Law* 114 n.20 (2d ed. 1988). We disagree. *Doremus* appears to make clear that a federal court will not give preclusive effect to the unreviewed state court decision in a *future* case, not that this Court could vacate a state court decision on review in the *same* case because of the absence of a case or controversy. The latter would have been inconsistent with the Court's explicit disclaimer (342 U.S. at 434) of any suggestion that a state court is barred from rendering an advisory opinion on a federal constitutional question where Article III standing is lacking.

⁵ We have furnished copies of our amicus brief in *Alaska Miners Association* to the parties here.

Court appeared to view the requirement that the state obtain "true value" for the school trust lands it leases as the key requirement of Section 28 and, as it noted (Pet. App. 26a), the record does not show whether any mineral lands have been leased for less than "true value." That is apparently why the court ordered the trial court to take further evidence to determine what relief may be appropriate (*id.* at 29a). Accordingly, review by this Court would be premature.

2. In any event, the Arizona Supreme Court correctly concluded that the appraisal requirement of Section 28 applies to mineral leases. As that court stated, the strict requirement in the New Mexico-Arizona Enabling Act that lands be appraised and then sold or leased "for a consideration [not] less than the value so ascertained" was Congress's response to the "sad experience" in other states (Pet. App. 5a (quoting *Murphy*, 65 Ariz. at 351, 181 P.2d at 344)). Accordingly, it would be inappropriate to limit the reach of that requirement, which was at the heart of the Enabling Act, without a clear indication that Congress so intended. The phrase authorizing leasing of mineral lands "in such manner as the Legislature of the State of Arizona may prescribe" is not such a clear indication. It may reasonably be read, as the court below and the other state courts it cited have concluded (Pet. App. 15a), as authorizing the legislature to set lease terms not in conflict with the express terms of the Enabling Act.

The 1951 amendment of Section 28 strongly supports that conclusion since, as the court below stated (Pet. App. 18a-20a), there would have been no reason to have provided expressly that hydrocarbon leases were not subject to the appraisal requirement, in addition to providing that leases may be granted "as the Legislature of the State of Arizona may prescribe," if the latter phrase itself negated the express appraisal requirements of the Enabling Act.

Moreover, since 1936 the Enabling Act had provided for the leasing of mineral lands, including leases for oil and gas, "in a manner as the State legislature may direct" (Act of June 5, 1936, ch. 517, 49 Stat. 1477), but that language was not understood to free the state from the appraisal, advertisement, and auction requirements. Indeed, the legislative history shows that the 1951 amendment was adopted specifically to remove the requirement of "10 weeks of detailed advertisement" that had "hindered" the development of oil and gas resources. S. Rep. 194, 82d Cong., 1st Sess. 2 (1951); see also H.R. Rep. 429, 82d Cong., 1st Sess. 2 (1951).⁶

This Court in *Alamo Land & Cattle Co.* read Section 28 as the Arizona Supreme Court did. It is true, as petitioners note (Pet. 18), that the Court's opinion "does not mention the language in the amended Section 28 that permits Arizona to make grazing leases [or, here, mineral leases] 'in such manner as the Legislature of the State of Arizona may prescribe.'" But that simply emphasizes that a natural reading of Section 28 does not suggest that by that

⁶ Petitioners have no adequate answer to the Arizona Supreme Court's conclusion that the 1951 amendment shows that Congress understood that specific language authorizing leasing without appraisal was required to make the appraisal requirement of the Enabling Act inapplicable, and that it would have added such language to the mineral lease proviso had it intended to authorize non-hydrocarbon mineral leasing without appraisal. They suggest (Pet. 15-16) that Congress adopted specific language relating to hydrocarbon leases in the 1951 amendment because it might have thought that the lengthy oil and gas leases it wanted to authorize could be regarded as sales. But, while that might explain why Congress expressly provided in Section 28 for leasing "for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities," it would not explain why Congress specifically authorized hydrocarbon leases "with or without advertisement, bidding, or appraisement."

phrase Congress intended to free the state from the specific restrictions of the Enabling Act.⁷

3. Contrary to petitioners' further contention (Pet. 8-9), review is not warranted to resolve the tension between the decision below and the Utah Supreme Court's decision in *Jensen*.⁸ Utah's Enabling Act, enacted in 1894 (645 P.2d at 33 n.3), provides that all proceeds from the school trust lands that Congress granted it must be placed in a permanent fund, "the interest only of which shall be expended" (*id.* at 33 (quoting § 10 of the Utah Enabling Act, ch. 138, 28 Stat. 110)). In 1939, Utah amended its Constitution to provide that, while proceeds from sales of school trust lands had to be placed in the permanent fund, the proceeds of mineral leases could be placed in another fund, along with the interest from the permanent fund, to be used for current expenses of the state's public schools. The Utah Supreme Court upheld that provision in *Jensen*, stating that the Jones Act "completely free[d]" the school trust mineral lands "from any restriction or limitation that

⁷ Nor is there merit to petitioners' suggestion (Pet. 16) that only the Jones Act, and not the Enabling Act or the Arizona Constitution, is relevant to the lands known in 1910 to contain minerals that were granted to Arizona in 1927. Article 10 of the Arizona Constitution, the "rescript" of Section 28 of the Enabling Act, differs from it by expressly providing that "all lands * * * acquired by the state" are subject to its restrictions (§§ 1, 9).

⁸ There is no merit at all to petitioners' contention (Pet. 16-17) that review is warranted because the decision below limits state sovereignty. Petitioners, who are mining companies, plainly have no interest in upholding state sovereignty, and the parties who might have such an interest, the Arizona officials and departments that were defendants below, have chosen not to seek review of the Arizona Supreme Court's decision. Moreover, the challenged decision was alternatively based on Article 10 of the Arizona Constitution (Pet. App. 27a). Accordingly, the federal-state balance plainly was not upset by the decision below.

may have theretofore existed, except as to use for public schools" (645 P.2d at 35).

Even if the Jones Act did free the states from the restrictions in their enabling acts, it is unlikely that the result here would be affected. In *Lassen*, 385 U.S. at 464, this Court, while strictly construing the appraisal requirement of Section 28 of Arizona's Enabling Act, declined to apply its advertisement and auction requirements in a case where the state wanted to acquire the land at issue by condemnation. The Arizona Supreme Court recently "decline[d] to follow that case in interpreting the identical language in the Arizona Constitution." *Deer Valley Unified School District No. 97 v. Superior Court*, No. CV-86-0577-T (June 30, 1988), slip op. 11. Emphasizing that the Enabling Act "merely sets out the minimum protection for our state trust land," the court concluded that Article 10 of the Arizona Constitution "does much more" (slip op. 12). Thus, while the court's decision here emphasized the language of Section 28 of the Enabling Act, the result it reached is independently supported by its construction of Article 10 of the Arizona Constitution, which it also cited in this case as an alternative basis for its holding (Pet. App. 27a).⁹ There is no federal impediment to a more restrictive state mineral leasing scheme than that required by the Enabling Act.

⁹ We do not mean to suggest that, under the principles of *Michigan v. Long*, 463 U.S. 1032 (1983), this Court lacks jurisdiction to review the Arizona Supreme Court's decision. The court relied primarily on analysis of the federal Enabling Act in reaching its decision in this case, so its decision "fairly appears to rest primarily on federal law" (*id.* at 1040). However, given the court's recent decision in *Deer Valley*, it seems plain that the court would reach the same result it reached here if it were required to base its decision exclusively on the Arizona Constitution rather than on the terms of the Enabling Act, and that practical consideration weighs against reviewing the decision below.

Moreover, the Jones Act was not central to the rationale of the court below, which relied primarily on the specific purposes motivating Congress to enact Section 28 and its modifications in 1936 and 1951, which indicate that Congress intended Arizona to comply with the restrictions in its Enabling Act in leasing the mineral lands granted to it whatever effect the Jones Act might have in other contexts. Accordingly, while the court below did not have the same view of the effect of the Jones Act as did the Utah Supreme Court, there is no square conflict. Moreover, if an issue analogous to that presented here or in *Jensen* arises in another state, the particular history of the state's enabling act will surely be relevant. Accordingly, the applicability of a decision by this Court in this case would be limited. For this reason as well, review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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ASARCO INCORPORATED, et al.,
Petitioners,
v.

FRANK KADISH, et al.,
Respondents.

On Petition for Writ of
Certiorari to the Arizona Supreme Court

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF ALASKA
MINERS ASSOCIATION, SOUTHWESTERN
MINERALS EXPLORATION ASSOCIATION, AND
GSA RESOURCES, INCORPORATED,
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In The
Supreme Court of the United States
October Term, 1987

ASARCO INCORPORATED, et al.,
Petitioners,
v.
FRANK KADISH, et al.,
Respondents.

**On Petition for Writ of Certiorari
to the Arizona Supreme Court**

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE IN
SUPPORT OF PETITIONERS**

INTRODUCTION

ASARCO Incorporated petitioned this Court for a writ of certiorari in the above captioned case. Movants, Alaska Miners Association, GSA Resources, Incorporated,

and Southwestern Minerals Exploration Association (movants hereinafter are referred to as Miners), have obtained permission from petitioners to file this brief amicus curiae in accordance with Supreme Court Rule No. 36.1. A letter of consent has been lodged with the Clerk of the Court. Miners have attempted to obtain permission from the State of Arizona and the respondents to file the attached brief amicus curiae in support of petitioners. This permission has not been forthcoming.

Because of the serious impacts that the Arizona Supreme Court's decision has had on the Arizona miners, because of the serious implications this case has in the interpretation of Alaska's Statehood Act, and because of the contribution Miners can make to the Court's understanding of these issues, this motion is filed. Miners seek leave of this Court to file the attached brief amicus curiae pursuant to Supreme Court Rule No. 36.1.

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ARGUMENT

LEAVE TO FILE THE ATTACHED BRIEF AMICUS CURIAE SHOULD BE GRANTED BECAUSE AMICI HAVE CRUCIAL INTERESTS IN THE OUTCOME OF THE CASE AND CAN AID THIS COURT'S UNDERSTANDING OF THE ISSUES

Miners represent a coalition of mine owners, leaseholders, and potential leaseholders or owners of prospecting permits from both Arizona and Alaska who have joined together to demonstrate to this Court the serious adverse consequences that will result if the decision of the Arizona Supreme Court is not overturned. Miners represent a

range of interests that have a vital stake in the proper interpretation of the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, and the Jones Act of 1927,¹ Pub. L. No. 570, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. § 870). The interests of Miners are described in more detail below. By receiving the accompanying brief amicus curiae this Court will better understand why the petition for writ of certiorari should be granted.

A. The Alaska Miners Association

The Alaska Miners Association (AMA) is a nonprofit, membership, industry association. AMA has approximately 1,500 members, most of whom reside throughout the State of Alaska. Some reside in the western United States or Canada. It is the stated policy of AMA to support environmentally sound mining operations throughout the State of Alaska. AMA is active in supporting and defending a balanced approach towards the regulation and leasing of mining claims. Towards this end, the Alaska Miners Association previously filed in this Court a petition for writ of certiorari in *Alaska Miners Association v. Trustees for Alaska*, as did the State of Alaska in *State of Alaska v. Trustees for Alaska*, Case Nos. 87-205 and 87-206. These petitions are presently pending before this Court and concern the proper interpretation of the Alaska Statehood Act.

Many individual members of AMA own leasehold interests in mineral lands in the State of Alaska. The statutory framework for the state's leasing system is controlled

¹ Also known as the School Lands Act of 1927.

by the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958) (codified at note preceding 48 U.S.C. § 21). Because both the Alaska Statehood Act and the Jones Act, granting mineral lands to Arizona and imposing a leasing system, contain nearly identical language, it is imperative that there be a proper interpretation of these statutes. By granting ASARCO's petition in this case, this Court will help all leaseholders in Alaska, as well as the Alaska courts, to better understand the actual meaning and applicability of the Alaska Statehood Act's leasing language that was first used in the Jones Act.

Until the uncertainty over the proper interpretation of the Jones Act type leasing language is resolved, leaseholders in Alaska are caught in an extremely difficult position. They have no way of determining whether or not a mineral property can be economically mined because they have no way of determining what the lease terms will be. About all that is certain is that if this Court does not correct the decisions of the Alaska and Arizona Supreme Courts, and if the legislatures of these respective states are usurped of their ability to set up leasing statutes, then leaseholders will be injured.

Unfortunately, the resolution of just one of these cases will not solve the legal ambiguities faced by the mining communities in Arizona and Alaska. The Alaska Statehood Act case will not resolve the difficulties that stem from that portion of the Arizona Court's decision that interpreted the 1910 Enabling Act. Nor will a resolution of the Arizona case resolve issues surrounding the unique legislative history of the Alaska Statehood Act. Together, however, a resolution of both cases should once and for all

end the dispute over the applicability and meaning of leasing requirements for lands that are mineral in character.

B. Southwestern Minerals Exploration Association

The Southwestern Minerals Exploration Association is a group of mineral exploration professionals who are actively involved in the shaping of natural resource development public policy. Southwestern Minerals Exploration Association has been active in promoting and supporting legislation at the state level and in fostering better relationships with state land user groups. The association believes that the Arizona Supreme Court's decision will result in higher royalty rates and highly uncertain maximum levels of lease payments. This in turn will discourage mineral exploration and production from state mineral lands in Arizona. Instead, the emphasis for exploration would shift towards the remaining federal lands in Arizona and lands in other states and nations.

Increased royalty payments, combined with state corporate income taxes, severance taxes, sales and use taxes, and property taxes will result in the closing of some productive mines resulting in a decline in tax revenues and lost economic opportunities. In the surviving mines, the "cutoff grade," the lowest grade of mineral produced, will be increased meaning that mines will have a shorter life and more low grade ore will be left in the ground.

In order to foster a successful state land minerals exploration program, there must be an incentive to explore on state lands. Specifically, there must be some assurance that if a prospector actually finds a mineral deposit the

prospector will have a preferential right to lease that prospect and that the royalty payments will guarantee not only a fair return to the state, but also a fair and *predictable* return to the miner. The Arizona Supreme Court's assertion that there must be an appraisal and auction of all mineral lands would foreclose this opportunity.

As a direct result of the Arizona court's decision at least one member of the Southwestern Minerals Exploration Association has lost substantial business when an outside investor withdrew from a lease development program because of the uncertainties created by the court's decision.

C. GSA Resources, Incorporated

GSA Resources, Incorporated (GSA), is a small family owned and operated mineral consulting and mining company. In terms of finances and resources, it is an entirely different class of mining company compared to ASARCO. The impacts from an adverse interpretation of the Arizona leasing laws will be felt much more directly by small companies like GSA. GSA is operating leases on 1,659.26 acres from the State of Arizona.² GSA first applied for prospecting permits in 1982 and it has mined some of these leases for industrial minerals since 1986. A substantial commitment of resources has been expended to develop and operate these leases. Continued operation of these leases is crucial to the company's ability to utilize these investments and quite possibly to its very existence.

² In order to obtain financing and bonding, the leases are personally owned by the family owners of GSA who are personally liable for any financial obligations.

In addition to the acres under lease, GSA's owners have 255.72 acres covered by prospecting permits for which it is attempting to convert to leases pursuant to Arizona Revised Statute § 27-254 (Supp. 1987). It has already paid for the right to prospect on this land anticipating that if its exploration efforts were successful, it would have a right to lease the land. GSA would not have pursued any exploration on these lands without assurances that it would also have the right to mine the minerals it had located. Nor could GSA have prudently explored on the state lands without knowing what its royalty payments would be in advance.

Because the Arizona Supreme Court has determined these leases to be in violation of the Enabling Act of 1910, GSA Resources cannot determine its rights and is in a state of turmoil. The Arizona Supreme Court remanded the case to the trial court to grant "such relief as may be appropriate." GSA, like all leaseholders in the state, has no way of knowing, for example, whether or not it must pay retroactive fees and royalties to make up for the difference between the previous leasing system and whatever system is formulated in conformance to the court's order. It has no way of knowing whether its contractual leasing obligations with the state are still valid, or whether they have been voided by the Supreme Court's decision.

GSA has no assurance that, if it continues to comply with the preexisting statutory duties with regard to these leases and prospecting permits, that it will be permitted to retain any interest in these leases, or if they must be auctioned to the highest bidder as implied by the Supreme Court. Finally, GSA has no way of knowing whether it has any property rights left in its leases or if those leases

are a complete nullity. About all that is certain is that the royalty rate, found by the Arizona Supreme Court not to be based on fair market value, will rise with an adverse effect on the viability of GSA's mining operations. In short GSA is in the untenable position of having to meet its obligations on its leases while not knowing what return, if any, it will receive from those leases.

CONCLUSION

There is a growing tendency for state courts to assume the prerogatives of legislative decision making for state land mineral leasing systems. Unfortunately, without the benefit of the legislative process, the consequences of this judicial legislation have been harsh for citizens who depend on mineral leasing on state lands. Movants for amicus curiae status represent a varied class of individuals in the mining community, both inside and outside of Arizona, who will be affected by the adverse precedent established by the Arizona decision. Furthermore, Miners have substantial expertise in the field of mineral leasing practices and statutes that will be of benefit to this Court's understanding of the case.

For these reasons, Miners respectfully request leave to file the attached brief amicus curiae.

DATED: May 24, 1988.

Respectfully submitted,

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In The **Supreme Court of the United States** **October Term, 1987**

ASARCO INCORPORATED, et al.,

Petitioners,

v.

FRANK KADISH, et al.,

Respondents.

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On Petition for Writ of Certiorari
to the Arizona Supreme Court

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**BRIEF AMICUS CURIAE OF ALASKA MINERS
ASSOCIATION, SOUTHWESTERN MINERALS
EXPLORATION ASSOCIATION, AND GSA
RESOURCES, INCORPORATED, IN SUPPORT
OF PETITIONERS**

INTERESTS OF AMICI

The interests of amici are outlined in the motion for leave to file brief amicus curiae.

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OPINIONS BELOW

The decision of the Supreme Court of Arizona is reported in *Kadish v. Arizona State Land Department*, 747 P.2d 1183 (Ariz. 1987). The decision was issued on December 10, 1987, and reconsideration denied February 2, 1988. The Arizona Supreme Court's decision was from an appeal of a ruling by the Maricopa County Superior Court in *Kadish v. Arizona Land Department*, Case No. C433745. Both opinions are reproduced in ASARCO's appendix to its petition for writ of certiorari.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3) as explained in ASARCO's petition at 1-2.

STATUTES INVOLVED

Amici adopt petitioner ASARCO's statement of the statutes involved found in ASARCO's petition at 2. The relevant statutes are reproduced in appendix E of ASARCO's petition.

STATEMENT OF THE CASE

Amici adopt the statement of petitioners at 2-7 of ASARCO's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

A. The Leasing of State Mineral Lands Is Subject To Complete Legislative Jurisdiction

The Arizona Supreme Court has eliminated the distinction between mineral and nonmineral lands in the New Mexico-Arizona Enabling Act of 1910, 36 Stat. 557, and the Jones Act of 1927, 43 U.S.C. § 870. To put it succinctly, Congress granted the new State of Arizona only *non-mineral* lands in the 1910 Enabling Act; while it granted *mineral* lands in the 1927 Jones Act. The nonmineral lands are and always have been the subject of the appraisal and auction requirements found in the 1910 Act; the mineral lands were made expressly subject to the leasing provisions in the 1927 Act. No subsequent amendment to the Enabling Act encumbered the leasing of mineral lands with any appraisal and auction requirements.

1. The Distinction Between Mineral and Non-mineral Lands is Critical to Understanding the Scope of the Legislature's Discretion

The distinction between mineral and nonmineral lands is crucial not only in Arizona, but in other western states as well. Alaska is a prime example. In *Trustees for Alaska v. State of Alaska*, 763 P.2d 324 (Alaska 1987), the Alaska Supreme Court correctly found that nonmineral lands, *i.e.*, those lands not known to have been of mineral character at the time they were selected by the State of Alaska are *not* subject to the mineral leasing provisions of Section 6(i) of the Alaska Statehood Act, 72 Stat. 339 (1958), codified at the note preceding 48 U.S.C. § 21. Such nonmineral lands are subject to the same provisions for

all general land grant lands found in Sections 6(a) and 6(b) of the Alaska Statehood Act just as nonmineral lands in Arizona are subject to the special 1910 Enabling Act requirements that include appraisal and auction.¹

Mineral lands, on the other hand, are subject to the express leasing provisions of the Jones Act which are repeated in the Alaska Statehood Act. Virtually identical language in both Acts calls for mineral lands to be leased "as the State legislature may direct." Herein lies the problem.

2. The Language "to be leased as the State legislature may direct" Provides the Arizona Legislature and Other State Legislatures Such as Alaska's with Broad Discretion in Fashioning Leasing Systems for Mineral Lands

Both the Arizona and Alaska Supreme Courts ignored the "as the State legislature may direct" provision, albeit for different reasons. The Arizona Supreme Court thought that the provision was superseded by a more general reference in the Jones Act to the state's earlier Enabling Act. The Alaska Court thought that the state legislature was required to follow an example of a federal statute, the Mineral Leasing Act of 1920, ch. 85, 41 Stat. 437, 30 U.S.C. § 181. In other words both courts thought Congress had

¹ Lands on which minerals were found after they were acquired by Arizona (or Alaska) are not transformed into "mineral" lands; they remain nonmineral. See, e.g., *Wyoming v. United States*, 255 U.S. 489, 498 (1921); *United States v. Sweet*, 245 U.S. 563, 572-73 (1918).

somewhat limited the unambiguous language "as the State legislature may direct." Congress, however, had not.²

The legislatures of both states had distilled their mineral leasing statutes into systems that maximized incentives to develop the state's mineral lands while ensuring a fair return, measured in both direct revenues and gross economic activity to the states. The legislative process is never simple, and it never satisfies all the parties. Nevertheless, because the systems were created "as the State legislature may direct," and because the legislatures have been careful to balance competing interests, any attempt to second-guess these legislative decisions must be carefully scrutinized.

3. Subsection (b) of the Jones Act Provides the Complete Mechanism for Leasing Mineral Lands

The language in the Jones Act is not empty of meaning. Words in statutes should not be read to be mere formalism without substance. *See, e.g., Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 (1883) (interpretation of bonding statute); 2A *Sutherland Statutory Construction* § 46.06 (4th ed. 1984). The Arizona Supreme Court ignored the crucial fact that the Jones Act followed the Enabling Act of 1910 and therefore must take precedence over that earlier Act. Because the Jones Act

² There also remains the issue of whether the mineral lease provisions were made applicable to all mineral lands or only a subset of the mineral lands. Both the Alaska Statehood Act and the Jones Act require that "such" lands be leased. "Such" lands can mean all mineral lands or just those lands referred to in the immediate preceding sentence—mineral lands where the surface estate has been "sold, granted, deeded or patented."

provides a mechanism for administering the newly granted mineral lands *that* mechanism should be used.

Subsection (a) of the Jones Act provides that "the grant of numbered mineral sections under this section shall be of the same effect as prior grants." Subsection (b) of the Jones Act contains the clause that gives the state legislatures authority to lease minerals as they direct. The Arizona court interpreted the general provisions of Subsection (a) of the Jones Act to have imposed certain Enabling Act requirements upon mineral leases thereby eviscerating the liberal leasing provisions of Subsection (b). This is incorrect for several reasons.

First, while the 1927 Act granted mineral land to the states, it did not provide an actual mechanism for transfer of title to the states. That was accomplished in 1934. *See Act of June 21, 1934, 48 Stat. 1185, 43 U.S.C. § 871 (repealed by Pub. L. No. 94-579, 40 Stat. 2792).* It is significant that Congress provided in the 1934 legislation that all patents shall show "the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any." This sort of language is the logical consequence of Subsection (a) of the Jones Act. Furthermore, without evidence that any mineral land patents contain the leasing restrictions discovered by the Arizona court, such restrictions should not be implied.

Second, when Congress amended the Enabling Act in 1936 the legislative history plainly demonstrated that Congress knew that the nonmineral lands granted in the Enabling Act were not subject to *any* lease provisions. In S. Rep. No. 90, 70th Cong., 1st Sess. 4 (1928), Secretary of the Interior Hubert Work stated "but no provision

was made in the [enabling] Act for the development or protection of minerals on state lands." In other words, there was no mechanism to lease minerals found on non-mineral lands that had been granted by the Enabling Act. Nor could such nonmineral lands be subject to the lease provisions of the Jones Act: "The provisions of this Act of 1927 would not apply to lands or minerals therein that might be granted under the Act of June 20, 1910." *Id.*³

In order to remedy this situation, the 1936 amendments were passed which provided a mechanism for the leasing of such nonmineral lands that contained minerals. *See Act of June 5, 1936, ch. 517, 49 Stat. 1477* (providing for the leasing "as the State legislature may direct" of said lands for mineral purposes"). This amendment did *not* set up a lease system for these lands with an appraisal and auction requirement. It set up a lease system for these nonmineral lands just like the lease system found in the Jones Act, with the legislature directing the leasing. Nor did the 1936 Act affect in any way the provisions of the Jones Act. It did not impose any new lease conditions upon the mineral lands granted in the Jones Act. In fact, there is no evidence that Congress intended the 1936 amendments to apply to the Jones Act mineral lands. Congress simply provided the identical method for all classes of mineral bearing lands: "as the State legislature may direct."

There are fundamental differences between the leasing of buried mineral deposits and the leasing of ordinary

³ Work also discussed what the provisions of the Jones Act leasing provisions were, namely leasing as "the State legislature may direct," the creation of a trust, and a provision for forfeiture. *Id.* Notably absent is any discussion of appraisal or auction.

land. Values for mineral deposits cannot be accurately determined until a suspected deposit is actually drilled and bulk sampling is performed. No one would go through the expense of drilling and sampling unless there was a *guaranteed* right to a lease and the lease terms were known in *advance*. In the minerals industry, the normal practice is to lease potential mineral lands for a set term of years with a fixed rental, and a net smelter return in case any minerals are discovered. *See generally* Rocky Mtn. Min. L. Inst., 3 *American Law of Mining* (2d ed. 1987). An appraisal and auction requirement for the leasing of mineral deposits would be extremely illogical. An appraisal and auction system would stifle incentives for exploration and development. Moreover, there is no indication that Congress meant to impose such a system on the leasing of mineral deposits.

Furthermore, a contemporaneous reading of the 1936 amendment is provided by the 1940 mineral leasing statute enacted by the Arizona legislature. Long continued and contemporaneous and practical interpretations of a statute by the executive officers charged with its administration and enforcement and by the public constitutes an invaluable aid in determining the meaning of a doubtful statute. 2A *Sutherland Statutory Construction* § 49.03; *Edwards' Lessee v. Darby*, 25 U.S. 206, 210 (1827). That 1940 statute, Laws of Arizona, ch. 78, § 4(b), established a royalty rate of "five percent of the net smelter or mint returns." This has been the long-standing law for nearly a half century. It has provided stability to the Arizona mineral exploration and development industries. It has worked well, and is fully consistent with the Jones Act and the 1936 amendments to the Enabling Act.

Finally, there is also no evidence that the 1951 Enabling Act amendments, Pub. L. No. 82-44 (1951), had any effect whatsoever on the leasing of any minerals, whether the minerals were on mineral lands originally granted by the Jones Act or nonmineral lands granted by the Enabling Act. The amendment was designed to facilitate oil and gas development by increasing the length of time that an oil deposit could be leased. The legislation was all encompassing and designed to make it absolutely clear that such leases would be practical and without unnecessary bureaucratic hindrances. That it expressly excluded auction and appraisal requirements was probably from an overabundance of caution. It is *not* an indication that such requirements were applicable to other mineral deposits.

B. Legislatively Derived Mineral Leasing Systems Provide Maximum Returns to the States

Congress declined to dictate specific leasing provisions for minerals granted under the Jones Act. The only requirement found in the applicable federal statutory law is that the minerals on such lands be leased "as the State legislature may direct." In Arizona the legislature interpreted this to allow it to set up a leasing system with 5% royalties and provisions to reward prospectors with the fruits of their exploration labors. The Arizona provision for a 5% net royalty lease provides incentive to the development of a small minerals industry for the maximum benefit of the school trust.⁴

⁴ In Alaska the state legislature interpreted this to be a broad grant of authority, and the legislature enacted a lease location

(Continued on following page)

The Arizona Supreme Court examined a report in evidence from the Arizona auditor general and decided that if Arizona raised its lease rates, it could gain higher state revenues. The report was flawed. For example, it neglected to account for the differences between different mineral commodities. It neglected to note that states with higher royalty rates often had the lowest overall revenues from mineral leases. The *Kadish* dissent by Justice Cameron recognized some of these fallacies when he noted that "the Legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands." *ASARCO* appendix at 36a, *Kadish*, 747 P.2d at 1200.

Courts are *not* appropriate economic policy decision making bodies. It is not the role of courts to determine what particular leasing scheme will provide for the maximum benefit to the State of Alaska or the school trust of Arizona. The courts are simply ill-equipped to deal with this sort of complex problem that is the province of the state legislative bodies. That is precisely why Congress provided that the leasing systems for mineral lands in the western states should be as the *legislatures* may direct. Congress did not provide any role for the state courts to second-guess these legislative decisions.⁵

(Continued from previous page)

provision designed to encourage the exploration and development of mineral resources in Alaska. This has provided a substantial boost to the stated goal in the Alaska constitution of settling the lands of Alaska while providing an economic base and production license revenues.

⁵ In addition it must be noted that under both the Alaska Statehood Act and the Jones Act only the attorney general is

(Continued on following page)

C. Congress Did Not Intend To Infringe upon Arizona's Sovereignty

The creation of the State of Arizona was not a case where the federal government has merely granted a favor or gift to an individual with strings attached, in which the strings must be taken, as the "bitter with the sweet." *Arnett v. Kennedy*, 416 U.S. 134 (1974). Rather, it is a case where the federal government is imposing conditions on one of the most fundamental of attributes of sovereign state government, the state's right to exercise unfettered jurisdiction over all of its property no matter what the source. The hyperspecific conditions on the leasing of state lands found in the Arizona Enabling Act, as interpreted by the Arizona Court, would be repugnant to the concept of independent sovereign state government. The original Enabling Act restrictions were, perhaps, enacted because of the federal government's legitimate paternalistic concern over the way certain states managed their lands. This concern, however, does not necessarily justify the infringement on independent state decision making as found in the 1910 Enabling Act.

Fortunately, the issue of the objectionability of the 1910 Act need not concern this Court. Because the 1910 Enabling Act appraisal and auction requirements do not govern the disposition of mineral lands, only the much less

(Continued from previous page)

empowered to bring suit to enforce the provisions of the Act. Here, Kadish brought suit under the authority of the Enabling Act. However, if this Court finds that the Jones Act alone affects the leasing of mineral lands, and that the Enabling Act is not applicable to this question, then it must find that Kadish has no jurisdiction to maintain the suit.

intrusive conditions of the Jones Act and the amended Enabling Act are of concern to mineral leasing. Congress wisely left it to the state legislature to establish a mineral leasing system.

CONCLUSION

The United States Congress gave to the legislatures of the western states, including Alaska and Arizona, the discretion to create their own mineral leasing systems. These systems are designed by the state legislatures to best meet state needs. They are tailored for local concerns. The Arizona Supreme Court incorrectly determined that Congress placed additional strictures on the mineral leasing requirements. This, naturally enough, has implications for a number of western states. This Court should grant ASARCO's petition for writ of certiorari in order to determine what, if any, restrictions Congress placed upon the leasing of state mineral lands and deposits.

DATED: May 24, 1988.

Respectfully submitted,

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

**ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA
COPPER COMPANY, AND JAMES P.L. SULLIVAN,
*Petitioners,***

vs.

**FRANK AND LORAIN KADISH, ET AL.,
*Respondents.***

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ARIZONA**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

AND

**BRIEF AMICUS CURIAE OF
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA
COPPER COMPANY, AND JAMES P.L. SULLIVAN,
Petitioners,

vs.

FRANK AND LORAIN KADISH, ET AL.,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA**

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

INTRODUCTION

Movant, Clinton Campbell Contractor, Inc. d/b/a Phoenix Brick Yard ("Phoenix Brick Yard"), prays for leave to file the appended Brief Amicus Curiae in support of the Petition for Writ of Certiorari filed by petitioners.

Movant has petitioners' consent to file an amicus brief and it is herewith submitted to the Clerk of the Court. Respondents Kadish and defendant Arizona State Land Department have declined to consent.

MOVANT'S INTEREST

Phoenix Brick Yard is a 75-year old family-held corporation. It has no parent, subsidiaries, or affiliates. It owns 23 mining claims situated on state trust lands near Pantano, Arizona. The trust lands are part of "indemnity school sections," that were selected in lieu of sections that were "mineral" or otherwise had been federally preempted.

The mining claims were discovered and perfected by movant and its predecessors under Arizona's mining law, which is, and always has been, virtually identical to federal mining law, except in one respect.¹ The claims are embodied in four state mineral leases first issued in 1958, 1959 and 1961, for terms of 20 years each.

Phoenix Brick Yard holds state mineral leases in Arizona. It did not appear in the action below.

In 1984, in *Tanner Companies v. Arizona State Land Department*, 142 Ariz. 183, 688 P.2d 1075 (Ariz. Ct. App.), the Arizona Court of Appeals reversed an administrative order of the Arizona State Land Department. The Department had determined that the nonmetallic Pantano clays being mined by Tanner and Phoenix Brick Yard under state mineral leases were not "minerals or mineral compounds," but were "common mineral materials." Therefore, the leases were subject to sale or disposition only after notice and at

¹ Federal mining law has been codified in the Territory and State of Arizona since at least 1901 (Ariz. Rev. Stat. § 3231 *et seq.* (1901), presently Ariz. Rev. Stat. §§ 27-201 through 222). Arizona's statutes pertaining to the discovery, location, and leasing of mining claims on state lands are found in Ariz. Rev. Stat. §§ 27-232 through 238. These statutes incorporate by reference and parallel the laws of the United States, but instead of providing for a patent, as does 30 U.S.C. § 29, they provide that a mining claim locator "*shall have a preferred right*" to a 20-year mineral lease and "*shall have a preferred right to renew the lease*," if he has complied with its terms and "is not delinquent in the payment of rental or royalty." Ariz. Rev. Stat. § 27-233.

public auction, like timber, sand, gravel, common clay and other natural products appearing on the surface of state trust lands. The Court of Appeals disagreed, holding that Pantano clays are valuable "clay minerals," subject to location and mineral leasing. *Id.* at 192, 688 P.2d at 1084. If Phoenix Brick Yard were deprived of the use of these minerals, it "could not stay in business." *Id.*

Thereafter, the four mineral leases were renewed for 20-year terms expiring in 1998, 1999 and 2001. They are subject to the royalty requirement ("five percent of net value of the minerals produced from the claim") prescribed by Ariz. Rev. Stat. § 27-234B. But if this royalty were doubled, as suggested by the legislative obiter of the Arizona Supreme Court; or even increased tenfold, the leases still would be "null and void" under the Arizona court's decision.

If the lower court has correctly interpreted the relevant federal statutes, not only are movant's leases null and void, so also are hundreds of other state mineral leases held by the class defendants below. Moreover, if the Arizona court has correctly interpreted federal law, every existing lease issued pursuant to Arizona's mineral leasing law was issued in breach of the trust imposed by Congress in Section 28 of the Arizona Enabling Act. This is so because Arizona law never has required that mining claims and mineral discoveries on state trust land first be "appraised at their true value" before being "offered" for mineral lease and thereupon leased at not "less than the value so ascertained."

GROUNDS FOR MOTION

The Petition for a Writ of Certiorari should be granted. It demonstrates that the Arizona Supreme Court has erroneously construed the Arizona Enabling Act of June 10, 1910, Pub. L. No. 219 (ch. 310), 36 Stat. 557, 568-79, and the Act of Jan. 25, 1927, Pub. L. No. 570 (ch. 57), 44

Stat. 1026, codified as amended at 43 U.S.C. 870 (the so-called "Jones Act").²

The Arizona Supreme Court's decision (155 Ariz. 484, 747 P.2d 1183 (1987), ASARCO's Petition, Appendix A), without so stating, renders null and void Phoenix Brick Yard's state mineral leases, as well as hundreds of other state mineral leases held by other lessees.

The reach of the decision far exceeds its stated grasp. Facially, it holds only that a subsection of a single statute (Ariz. Rev. Stat. § 27-234B) violates § 28 of the Arizona Enabling Act (36 Stat. 557, 574-75) and Article 10 of Arizona's Constitution. Its legal and practical effects, however, are to scrap Arizona's mineral leasing law, to void all leases issued under that law, and, except as to oil and gas exploration, to jeopardize future mineral exploration and prospecting on Arizona State trust lands.

The court's strained construction of § 28 of Arizona's Enabling Act, as it was enacted by the Congress in 1910, and as presently amended,

- Is contrary to Congress' intent, if the language of the 1910 Act is given its ordinary meaning;
- Ignores and obscures the economic necessities of prospecting and exploring for subsurface deposits of valuable ores and minerals and of developing them after discovery and location;
- Disregards the clear meaning and intent of the Jones Act, and treats this enactment as a mere "amendment" to the Arizona Enabling Act;
- Offends the national mineral policy as expressed by Congress from 1872 to the present; and

² The bill (S.B. 564) offered by Senator Jones was amended in the House by striking all of its provisions after the enacting clause (68 Cong. Rec. 2581 (1927)). The court below nevertheless refers to this legislation as "the Jones Act." Movant will do so for consistency.

- Overlooks the correct and consistent constructions placed on § 28 by the People of Arizona and its Legislature since 1915.

The Petition for Certiorari correctly analyzes the Enabling Act and the Jones Act, and fully addresses the actual holding of the Arizona decision. The state court's holding appears to have been reached in a judicial vacuum. Because the decision *itself* fails to consider, and in fact obscures the legal and practical results that inevitably will follow if it is permitted to stand, the grounds noted above should be considered by the Court. Some of these grounds are not discussed by the Petition and others merit fuller discussion, which would aid the Court.

Permitting movant to file the appended Amicus Brief would allow movant to protect its vital interests and property rights and to advance different reasons showing that a writ of certiorari should be granted.

Respectfully submitted,

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May 25, 1988

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA
COPPER COMPANY, AND JAMES P.L. SULLIVAN,
Petitioners,

vs.

FRANK AND LORAIN KADISH, ET AL.,
Respondents.

**On Petition for a Writ of Certiorari
to the Supreme Court of the State of Arizona**

**BRIEF AMICUS CURIAE OF
CLINTON CAMPBELL CONTRACTOR, INC.
d/b/a PHOENIX BRICK YARD**

Movant, Clinton Campbell Contractor, Inc. d/b/a Phoenix Brick Yard ("Phoenix Brick Yard"), submits this Brief Amicus Curiae in support of the Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona filed by ASARCO Incorporated, Can-Am Corporation, Magma Copper Company, and James P.L. Sullivan.

By the 1910 Enabling Act, Arizona, like other western land-grant states, was organized and admitted "on an equal footing" with existing states.

Out of each 36-section township of federal land, Congress granted Arizona sections 2 and 32, and confirmed the prior territorial grant of sections 16 and 36. From the

grants, however, Congress specifically reserved all of said sections "or any parts thereof, [that] are mineral." Thus, contrary to the analysis of the Arizona court, Congress expressed no "intent" whatsoever in the 1910 Act as to any Arizona mineral leasing scheme.

Arizona's Enabling Act, like others, provided that the lands granted or confirmed to the state "shall be by said State held in trust, to be disposed of in whole or in part only in the manner as herein provided." The Act also provided that sales, leases or other disposals not made in conformity with its provisions constitute a "breach of trust" and are "null and void."

For convenient reference, relevant portions of the Arizona Act are reproduced as Appendix ("App.") 1 hereto. As enacted, Section 28 of the Act contained 10 unnumbered paragraphs. These paragraphs have been numbered for discussion purposes. The crucial paragraphs here involved are those numbered 3 and 4. (App. 1 hereto, pp. 2a-3a.)

The Arizona court has seriously misconstrued the plain and unambiguous words of paragraphs 3 and 4 of Section 28.

REASONS FOR GRANTING THE WRIT

The Appraisal, Advertising and Auction Requirements of Section 28 Are Not and Never Were Applicable to Short-Term Leases.

The foundation of the Arizona court's holding is the court's erroneous conclusion that Congress intended in 1910 that Arizona leases of state land for terms of "five years or less" (par. 3), "before being offered, shall be appraised at their true value" and that no "disposal [lease] thereof shall be made for a consideration less than the value so ascertained." (Par. 4) If this was not the intent of Congress, the major premise of the lower court's holding is invalid and its decision cannot stand.

The lower court ascribes this 1910 intent to Congress to avoid the obvious meaning and effect of the 1927 Jones Act. From this presumed Congressional intent, the Arizona court concludes that Congress authorized each of the other ten western land grant states to lease the granted mineral deposits "as the State legislature may direct," but deliberately withheld this power only from Arizona. If the Arizona court has misapprehended the 1927 intent of Congress, its decision must fall.

In 1936, Congress struck the proviso of the third paragraph of Section 28 of the 1910 Act:

~~"Provided, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required."~~

The following proviso was substituted:

"Provided, That nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands referred to in this section for grazing or agricultural purposes for a term of ten years or less, and from leasing any of said lands for mineral purposes . . . for a term of twenty years or less." 49 Stat. 1477, 1478 (1936).

The part of the fourth paragraph of Section 28 of the 1910 Act quoted below has not been amended. The crux of this paragraph reads:

"All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ."

The lower court obviously read the fourth paragraph as a free-standing provision not *pari materia* to paragraph 3. The court's conclusion that the third and fourth paragraphs are not interrelated is unsound and unreasonable. For example, why would Congress exempt short-term leases from the cumbersome and expensive advertising and auction requirements, but require them to be appraised? Because the fourth paragraph specifically requires "leaseholds" to be appraised, it is apparent that Congress intended the appraisal and advertising requirements not to apply to short-term leases.

The simple and practical explanation for exempting short-term agricultural and grazing leases from Section 28's appraisal, advertising and auction requirements was that, in Arizona and many of the new western states, farming and cattle raising were principal industries. Farmland and grazing land possessed market rental values that were commonly known. The most likely reason for exempting 20-year mineral leases from the appraisal and other requirements is that Congress, unlike the court below, recognized that unpatented mining claims and unexploited mineral deposits are not capable of appraisal at "true value" before mining production begins.

The words "herein contained" in the proviso of the third paragraph appearing in both the 1910 and 1936 statutes must be applied to Section 28 *in its entirety*. Any other construction is nonsensical.¹ If the Arizona court's interpretation were applied to this and similar terms that appear

¹ Beginning with Section 19, and throughout the Arizona portion of the 1910 Enabling Act, Congress used the words "herein contained," "herein provided," "hereinbefore provided," "herein" and "contained." If these words and references are fairly read, they often apply to the entire Act. In some instances they refer to subjects (e.g., elections) that are covered in several sections. In every instance they apply or relate to the section of the Act in which they appear. In no instance can their meaning be logically or reasonably confined to a single part or unnumbered paragraph of a section. Yet, the lower court has rigidly restricted the mean-

in other sections of the Act, these sections would be rendered meaningless.

The court's construction ignores a fundamental tenet of statutory construction applicable in both Arizona and federal courts: Courts will avoid statutory interpretations that lead to absurd results, which could not have been contemplated by the legislature. *United States v. Turkette*, 452 U.S. 576, 580, 101 S. Ct. 2524, 2527 (1981); *Smith v. Pima County Law Enforcement Council*, 113 Ariz. 154, 157, 548 P.2d 1151, 1154 (1976). For example, the words "in the manner as herein provided" in the first paragraph of Section 28, would have no effect if application of the words were confined to that paragraph and not carried down and applied to the third and fourth paragraphs. Similarly the "nothing herein contained" clause of the tenth paragraph would be idle if it were restricted to that paragraph and not related back to all parts of Section 28.

The Arizona court has restricted the application of the "nothing herein contained" proviso of the third paragraph to *that paragraph only*. This strained construction requires the bizarre conclusion that, while paragraph 3's "advertisement," "publication" and "auction" requirements apply to all dispositions other than short-term leases, short-term leases still must be appraised.

The meaning and purpose of paragraph 4 are clear from the paragraph itself. The requirement of appraisal of lands (including long-term leaseholds), timber, stone and any other "natural products" of the land, is but a step in

ing of "nothing herein contained" in the third paragraph to that paragraph *only*. The very same proviso says that short-term leases may be made "without said advertisement herein required." From this usage, the lower court could as logically have concluded that, while Congress intended that "advertisement" was unnecessary as to short-term leases, they nevertheless must be sold at public auction. This would make no sense at all because Congress used the word "advertisement" as a short-hand way of describing the mechanics of offering and selling trust assets.

the process of "offering" the property as set forth in paragraph 3. Appraisal is merely part of the "advertisement" referred to in the 1910 Act. This was a way to describe the procedure for sale or disposition.

It would be highly imprudent, if not a breach of trust, to fully comply with the elaborate notice, publication, auction, and other sale and disposal requirements of the third paragraph, and then to conduct an auction of a parcel of land or tract of timber without any knowledge or opinion as to the value of the property being auctioned. The use of the words "*before being offered*" in the fourth paragraph necessarily relates back to the words "*offered*" and "*so offered*" as these words appear and are used in the third paragraph.

The lower court's opinion attempts to create a one-way street, when Congress intended that traffic should move in both directions. This result should not be permitted to stand.

By the 1936 amendment of the third paragraph, Congress not only lengthened the five-year lease term, it also specified particular leasing purposes, implying that leases for other purposes, such as business or commercial leases, would continue to be subject to all of the requirements of Section 28, including the appraisal requirement. The short-term leasing authority granted in 1910 was vested generally in the "State." In 1936, Congress specifically confirmed the power to lease in any manner "*as the state legislature may direct*." Significantly, Congress chose the identical words that it had used in the 1927 Jones Act to vest plenary power in the western states to lease the minerals granted by the Jones Act.

The Arizona Court's Decision Not Only Disregards the Meaning and Intent of the Jones Act, It Also Creates Mineral Resource Management Difficulties in Arizona that are Far More Serious than Those Which Initially Prompted Enactment of the Jones Act.

The 1927 Jones Act was the first Congressional authorization for Arizona and the other ten western land grant states to lease mineral deposits. 44 Stat. 1026-27, Petition Appendix E.

When it enacted the Jones Act, Congress intended, and so avowed in its proceedings, to place these states on an equal footing *inter se*, and with the other land grant states. Subject only to then-existing mining claims and other outstanding claims and rights, Congress transferred sovereignty over mineral lands and rights to these eleven states with plenary leasing power.

Congress envisioned that each state would adopt a mineral leasing and royalty regime, because it forbade the states to sell or patent "coal and other minerals," and broadly granted each state the power to lease "coal and other mineral deposits . . . as the State legislature may direct."

Congress also required that the "royalties" from mineral leases *must* be "utilized for the support or in aid of the common or public schools." The Arizona court treats the words last quoted as redundant. It looks instead to the third and fourth paragraphs of Section 28 of the 1910 Enabling Act to derive the 1927 intent of Congress with respect to mineral leasing. The court also reads and repeatedly characterizes the Jones Act as a mere "amendment" to the Arizona Enabling Act. (747 P.2d at 1189, 1190.)

Through its tortured construction of the third and fourth paragraphs of Section 28 of the 1910 Act (which had nothing whatever to do with minerals or mineral leases),

the Arizona court rejects the Jones Act's grant of sovereignty and subverts the intent of Congress to place the states on an "equal footing." In doing so, the court inserts a banana peel under one of Arizona's feet.

Within a few years after Arizona and New Mexico were admitted to statehood in 1912, it became apparent that the severance and federal reservation of the mineral estate from the lands granted to the eleven states affected by the Jones Act, was engendering uncertainty, disputes and litigation. By 1927, Congress and the federal agencies and officers charged with administering the mining laws and managing the reserved minerals on land owned by these states and their grantees realized that the system was troublesome and inefficient.

The root cause of the title disputes, uncertainties, and problems that arose from dual sovereignty and separate management of the surface and mineral estates was the difficulty of determining which of the previously granted sections was "mineral" or "mineral in character." Often it was simply impossible to make this determination until mining operations were successfully undertaken and paying quantities of minerals were recovered.

The Arizona court, on the one hand, acknowledges and carefully outlines these problems, dilemmas and uncertainties that came to light only upon "subsequent mineral discovery." (747 P.2d at 1187.) On the other hand, the Arizona court's decision turns the clock back a century by simply assuming that the state's engineers or mineral appraisers somehow can determine the "true value" of a located but unproven mining claim, or an unmined subsurface mineral deposit, before they are offered for lease; whereas their counterparts in prior generations were unable even to determine grossly whether or not land was mineral in character.

Obviously the Arizona court must have presumed that *someone* would expend the necessary thousands or millions of dollars and do the required discovery and exploration work to permit the state's mineral appraiser to determine, in advance of leasing, the "true value" of a mineral claim or deposit. This "*someone*" would have to be a state agency, because even the most daring private entrepreneur would not be reckless enough to devote such efforts and expenditures on state trust land for the privilege of attending a public auction where he could be deprived of the fruits of his efforts. This is particularly true if the entrepreneur also would face the forfeiture of his labor and expenditures.

Section 28 of the Arizona Enabling Act and its cognate Arizona provision (Arizona Constitution, Article X, Section 10) are written to provide that "lessees" and even "former lessees" are "protected in their rights to their improvements" on state land. Assuming *arguendo* that holes in the ground left by core drilling or stripping, or computer sheets reflecting seismic or sonic exploration and showing geologic anomalies or ore bodies, could be classified as "improvements," the locator or owner of mining claims on state land is *not a lessee* regardless of how much he may have invested in discovery, location or exploration costs.

Prospectors and mineral explorers will shun Arizona's trust land for federal land, where they can receive a patent, or for land in other states or jurisdictions where they can avoid the guesswork of a predevelopment appraisal and where their genius, industry and expenditures guarantee them a mineral lease rather than the right to attend a public auction of their own mining claims.

The "appraisal at true value" requirement erroneously imposed by the lower court on mineral leases and other short-term leases would be impractical, and unworkable and, indeed, actually harmful to the trust, even if the third and fourth paragraphs would tolerate the interpretation placed on them by the lower court.

If this Court should agree with the lower court that the 1910 intent of Congress was to exempt short-term leases from all of Section 28's sale and disposal requirements except appraisal, that intent cannot apply to mineral leases. To so apply it would frustrate the very purpose of the Jones Act. Arizona would be singled out for disparate and harmful treatment simply because its own Supreme Court disagrees with the royalty rate that its legislature has set for mineral leases.

The Lower Court Misreads the 1927 Joint Resolution Affecting New Mexico and Misinterprets the 1936 and 1951 Amendments of the Arizona Enabling Act.

The Arizona court places undue emphasis on Joint Resolution No. 7, 45 Stat. 58 (1928), which gave effect to New Mexico's proposal to amend its Constitution to give the state broad latitude to enter leases and contracts "for the development and production of any and all minerals," including oil and gas. The language relied on by the lower court was written in New Mexico, not Washington. Similarly, the Arizona court reads into the language of the 1936 and 1951 Congressional amendments of the third paragraph of Section 28 of the Arizona Enabling Act meanings that could not have been intended.

A wildcatter or oil explorer in Roswell in 1927 would have been loathe to spend money to drill for oil on New Mexico trust land under a statute (the Jones Act) which permitted New Mexico to make leases "for coal and other mineral deposits."

There were wildcatters in Roswell in 1927. Unlike Arizona, New Mexico produces a substantial amount of crude oil and natural gas.² New Mexico's constitutional

amendment permitting exemption of mineral leases from all "advertisement" requirements, including "appraisal," details the effect of the Jones Act more fully than the Act itself. But, it does not necessarily follow, as the Arizona court assumes, that Congress even considered the specific language of the Jones Act, much less the Arizona Enabling Act, when it approved New Mexico's proposal. It is just as logical to conclude that Congress acted out of courtesy rather than necessity.

Legislative bodies enact statutes one at a time. The elaborate motive and intent of Congress as to Arizona's Enabling Act that the lower court reads into its consideration of the New Mexico proposal is as speculative as the lower court's conclusion that when Congress passed the Jones Act it was as concerned about a mere proviso in the Arizona Enabling Act as it was with the Jones Act legislation.

The 1951 insertion into Section 28 of Arizona's Enabling Act of a provision allowing oil and gas leases to be issued "with or without advertisement, bidding, or appraisal" provides no support for the strained construction made by the Arizona court.

The 1951 amendment, according to its legislative history, was needed to remove perceived restrictions on oil and gas development and production. Arizona's oil and gas expectations are unrealized. There are no proven oil fields or producing wells on Arizona trust land. If a large oil and gas field were discovered and developed near Tucson, and it encompassed numerous state-owned sections, appraisal and the public auction of leases might well be required.

² For the past several years it has annually produced more than 70 million barrels of petroleum and approximately 1,000 billion cubic feet of gas. *Statistical Abstract of the United States*, p. 644, Table No. 1172 (1988). Arizona, on the other hand, reports no production of oil or gas. *Id.* and *id.*, p. 657, Table No. 1156.

² For the past several years it has annually produced more than

Negotiating a lease price, or even opening bidding at \$1.00 for an oil and gas lease that is virtually certain to produce substantial oil or gas, would not only be contrary to the state's interest, but would very likely constitute a breach of trust.

The 1951 Congressional grant to Arizona of the option to issue oil and gas leases "with or without" appraisement, advertising or bidding provides no support for the Arizona court's decision. On the contrary it evidences the breadth of the power granted to the states to lease minerals. The 1951 amendment permits Arizona to promise oil and gas developers and lessees that they can retain a lease so long as production continues. The 1951 option, permitting the legislature to require or not require appraisement, advertisement and auction of oil and gas leases, could be very beneficial to the trust. It allows either exploration without advertisement and appraisal, or a full-blown lease auction if actual production is assured to the bidders.

The Arizona Court Overlooks the Legislative Construction Placed on Section 28 since 1915 and Ignores National Mineral Policy.

All Arizona courts, including its highest court, are bound by rules which provide that court's do not legislate and that a legislative construction is to be given great weight, *see, e.g.*, *State v. Barnett*, 142 Ariz. 592, 691 P.2d 683 (1984), and that the purpose of statutory construction is to give effect to legislative intent. *E.g., Calvert v. Farmers Insurance Company of Arizona*, 144 Ariz. 291, 697 P.2d 684 (1985).

The lower court does not even mention the actions of the Arizona legislature in response either to the original Enabling Act and its amendments or to the Jones Act.

An examination of the act adopted by Arizona's legislature in 1915, Laws of Ariz., 1915, 2d Spec. Sess., Ch. 5

(*see App. 2 hereto*), reveals that the legislature well understood that Arizona was receiving and selecting land under the Enabling Act that was, in fact, mineral in character. This occurred in all the states, and stemmed from the difficulty or impossibility of determining the mineral character of land from a surface examination. This court addressed a phase of the problem in *Wyoming v. United States*, 255 U.S. 489, 41 S. Ct. 393 (1921).

By the 1915 statute, the Arizona legislature reaffirmed the federal procedure for locating mineral claims on state land, gave locator's of claims preferred rights to lease, provided for five-dollars per claim, two-year leases, without advertising *appraisement*, and limited lease production to 50 tons of ore until a royalty contract was executed by the locator and the State Land Department.

Under the lower court's reasoning, Arizona's 1915 mineral leasing scheme, or for that matter a statute that authorized a five-year grazing lease without appraisement, would have violated the appraisement requirement of Section 28.

The 1915 statute was unchallenged until 1927. Shortly after the enactment by Congress of the 1927 Jones Act, the Arizona legislature also acted to accept the benefits of the Jones Act.

Though the purposes of the Jones Act were not recognized below by Arizona's Supreme Court, Arizona's 1927 legislature clearly apprehended the meaning and purpose of the Jones Act and immediately reenacted Section 38 of the prior 1915 enactment *in haec verba*. Laws of Ariz., 1927, 4th Spec. Sess., Ch. 29 (*see App. 3 hereto*). There could be no clearer evidence of the understanding and acceptance of Arizona's legislature that Congress intended by the Jones Act that "coal and other mineral deposits . . . shall be subject to lease by the State as the State legislature may direct." No other explanation exists for the word-for-word reenactment of Section 38. *See App. 3 hereto.*

Unlike the 1927 New Mexico legislature, Arizona's 1927 legislature read the Jones Act as including the right to issue leases for *all minerals*, including oil and gas leases. The only changes it made in original Section 38 of the Arizona act (App. 2 hereto), were the addition of a new part (g) and the updating of a 90 day lease preference right in part (b).

By part (g) the legislature authorized oil and gas leases for renewable five-year terms, provided for a rental payment of 10 cents per acre, required a drilling program and specified a 12½ percent royalty on any oil and gas that was commercially produced. Once again, the Arizona legislature construed Section 28 of the Enabling Act as not requiring advertisement or *appraisal*. See App. 3 hereto.

The Arizona legislature's sensitivity to the need for mineral exploration and development is clear from its 1961 enactment providing for prospecting permits.³

Arizona's present mineral leasing law is set forth in Appendix 4 hereto for comparison purposes. The current perception of the Arizona legislature of the meaning and effect of both the Enabling Act and the Jones Act is clear from these statutes. Further evidence of its understanding of the Enabling Act is revealed by Arizona's statute relating to the disposition of common mineral materials and products. This act, first adopted in 1967, now appears in Ariz. Rev. Stat. §§ 27-271 through 275. The statute provides in part that no common mineral materials or products will be disposed of at "less than the true appraised value." The regulations supplementing the act permit disposal of common mineral products only at public auction.

³ Ariz. Rev. Stat. §§ 27-251 through 256 provide for exclusive prospecting permits on state land for one-year terms, renewable for five years. This allows and encourages large-scale exploration and assures the prospector that he can obtain a state lease on any minerals discovered and developed within the permitted area.

The decision of the Arizona court affords no weight to almost a century of Arizona legislative history. The Congressional grant of leasing power was made to Arizona's legislature, not its courts, yet the court below does not discuss Arizona's own mining laws or consider the constructions placed on the relevant federal acts by its legislature. Neither does the lower court discuss or consider the national mineral policy.

A clear exposition of the early national mineral policy is set forth in H.R. Rep. No. 730, 84th Cong., 1st Sess. (1955). The report points out:

"Mineral resource utilization comes about only after: (1) prospecting; (2) exploration; and (3) development.

Historically, the Federal mining law has been designed to encourage individual prospecting, exploration, and development of the public domain. The incentive for such activity has been the assurance of ultimate private ownership of the minerals and lands so developed. Under these laws, prospectors may go out on the public domain not otherwise withdrawn, locate a mining claim, search out its mineral wealth and, if discovery of mineral is made, can then obtain a patent. The property, with issuance of patent, becomes the individual's to develop or sell, according to his initiative or desire."

Similarly, the Mining and Minerals Policy act of 1970, Pub. L. No. 91-631, 84 Stat. 1876 provides:

"The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help

assure satisfaction of industrial, security and environmental needs, . . ."

House Report No. 91-1442, 91st Cong., 2d Sess. (1970) points out the need for a mineral policy.

"There appears to be little argument about the need for a broad national minerals policy to guide both the Federal Government and private industry with respect to this Nation's long-range minerals position. Ours is more and more a mineral-based economy and whether viewed as a part of a peacetime economy or as a necessary mobilization base in times of emergency, the future well-being and national security of our Nation is directly tied to the supply and availability of minerals."

Any federal grant of school lands to the State of Arizona, must be viewed in light of the mining laws, the school land laws, and public mineral policy. *United States v. Sweet*, 245 U.S. 563, 38 S. Ct. 193, (1918) (where a statute granting school lands to Utah failed to state whether mineral lands were excepted, the grant had to "be read in the light of the mining laws, the school land indemnity law, and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will." *Id.* at 563, 38 S. Ct. at 195.)

When Congress enacted the Jones Act and later amended Arizona's Enabling Act, it did so against the backdrop of the national mineral policy, which was and is to encourage and promote mineral exploration and production. The Arizona court apparently gave no consideration to this policy.

If mineral exploration and location on Arizona's trust lands are to be jeopardized, and if the essential purpose of Congress as expressed in the Jones Act and the amendments

to the Arizona Enabling Act is to be ignored, compelling justifications must exist. The tenuous reasoning of the Arizona court fails to provide these justifications.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

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May 25, 1988

Appendix 1

**Excerpts from Act of June 10, 1910, 36 Stat. 557,
568, 572, 574 and 575. (Arizona Enabling Act)**

Note: All underlining added.

"CHAP. 310. — An Act . . . to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . .

* * *

"SEC. 19. That the qualified electors of the Territory of Arizona are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of Arizona. . . ."

* * *

"SEC. 24. That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, . . ."

[Selections in lieu of mineral lands authorized by Congress] (brackets added).

[par. 1] "SEC. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified. . . . and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

[par. 2] Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

[par. 3] . . . Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

[par. 4] All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained"

[par. 8] "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

[par. 9] It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

[par. 10] Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen hereof to enforce the provisions of this Act."

For convenient reference, Section 28 of the Arizona Enabling Act of 1910, Pub. L. 219 (ch. 310), 36 Stat. 557, 574-75, is reproduced in its entirety as follows:

"SEC. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such

moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

Appendix 2

Excerpts from Laws of Arizona, 1915, Second Special Session, Ch. 5.

* * *
* * *

Sec. 38. The department is hereby authorized to execute leases and contracts for the leasing of lands containing gold, silver, copper, lead or other valuable minerals, or for any land containing shale, slate, petroleum, natural gas, or other valuable natural deposits which the state now owns or to which it may hereafter acquire title.

(a) Any citizen of the United States finding valuable minerals upon any unsold lands of the state may apply to the department for a lease of any amount of land not to exceed the amount and dimensions allowed by the mining laws of the state and the United States.

(b) The manner of locating a mineral claim upon state land shall be in accordance with the law of the state regulating the location of mineral claims on government lands; provided, that any citizen or citizens who may have found minerals on unsold state lands previous to the passage of this act and posted notices in accordance with the mining laws of the State, and the United States, shall have preference right to lease the same, and shall have ninety (90) days after the passage of this act, in which to make application to the department for such lease.

(c) For the purpose of developing such mine or mines, the applicant shall, upon the payment of five (5) dollars per claim, receive from the department a lease for two years; provided, however, that no more than fifty tons of ore shall be removed from the premises for any purposes until a contract shall have been executed, as hereinafter provided.

(d) The lessee may cut and use the timber found upon said claim for fuel, and in the construction of buildings required in the operation of any mine or mines, on the claim; also the timber necessary for drains, tramways, and supports for such mine or mines, but for no other purpose.

(e) Any time prior to the expiration of said lease, the lease-holder, or any assignee thereof, shall have the right to obtain from said department a contract, which shall bind the State of Arizona, as a party of the first part, and the person, or persons, or corporation, to whom said contract shall issue, as party of the second part, in a mutual observance of such obligations, terms, and conditions as may be agreed upon by said department and the said lessee.

(f) Whenever any lessee of mining property shall be convicted of fraud or wilful misrepresentation in connection with the procuring of any such lease, or the handling or shipping of ores or other dealing with the product or proceeds of any property leased under the provisions of this act, the penalty shall be the forfeiture of the lease to any such mine or mining claim, and all improvements placed thereon, or used in connection therewith, and all property pertaining thereto and all moneys paid thereon and all rights, title or claim to any and all of said property shall be vested in the state without further or other procedure on the part of the state."

"* * *"

Appendix 3

Excerpts from Laws of Arizona, 1927, Fourth Special Session, Ch. 29.

"Be It Enacted By the Legislature of the State of Arizona:

Section 1. That Section 38 of Chapter 5 of the acts of the Second Special Session of the Second Legislature, State of Arizona, 1915, be and the same is hereby amended to read as follows:

Section 38. The department is hereby authorized to execute leases and contracts for the leasing of lands containing gold, silver, copper, lead or other valuable minerals, or for any land containing shale, slate, petroleum, natural gas, or other valuable natural deposits which the state now owns or to which it may hereafter acquire title.

(a) Any citizen of the United States finding valuable minerals upon any unsold lands of the state may apply to the department for a lease of any amount of land not to exceed the amount and dimensions allowed by the mining laws of the state and the United States.

(b) The manner of locating a mineral claim upon state land shall be in accordance with the law of the state regulating the location of mineral claims on government lands; provided, that any citizen or citizens who may have found minerals on unsold state lands previous to the passage of this act and posted notices in accordance with the mining laws of the state and the United States, shall have preference right to lease the same.

(c) For the purpose of developing such mine or mines, the applicant shall, upon the payment of five dollars per claim, receive from the department a lease for two years; provided, however, that no more than fifty tons of ore shall

be removed from the premises for any purposes until a contract shall have been executed, as hereinafter provided.

(d) The lessee may cut and use the timber found upon said claim for fuel, and in the construction of buildings required in the operation of any mine or mines, on the claim; also the timber necessary for drains, tramways, and supports for such mine or mines, but for no other purpose.

(e) Any time prior to the expiration of said lease, the lease-holder, or any assignee thereof, shall have the right to obtain from said department a contract, which shall bind the State of Arizona, as a party of the first part, and the person, or persons, or corporation, to whom said contract shall issue, as party of the second part, in a mutual observance of such obligations, terms and conditions as may be agreed upon by said department and the said lessee.

(f) Whenever any lessee of mining property shall be convicted of fraud or wilfull misrepresentation in connection with the procuring of any such lease, or the handling or shipping of ores or other dealing with the product or proceeds of any property leased under the provisions of this act, the penalty shall be the forfeiture of the lease to any such mine or mining claim, and all improvements placed thereon, or used in connection therewith, and all property pertaining thereto and all moneys paid thereon and all rights, title or claim to any and all of said property shall be vested in the state without further or other procedure on the part of the state.

(g) The department is hereby authorized to execute oil and gas prospecting leases which shall run for a term of two years and under which a rental of one hundred dollars shall be paid for each six hundred and forty acres for the two year term. The rental under a lease containing less than six hundred and forty acres shall be at the rate of twenty-five dollars for each one hundred and sixty acres or fraction thereof. Not exceeding two thousand five hundred and sixty acres shall be included in any one such prospecting

lease. A separate lease must be executed for each separate parcel or plot of land, and all lands included in any lease must be adjoining.

In the event lessee shall have started actual drilling for oil and is continuing same, prior to the expiration of the term mentioned in said lease, said lessee shall have the right of renewal, and, provided, that in the event oil or gas shall have been discovered to exist in commercial quantities on lands covered in such lease prior to the expiration of such lease, then and in that event, lessee shall have the right to, and the Department is hereby authorized and directed to issue to said lessee a development and operating lease upon said land which shall run for a period of five years and which upon expiration shall be renewable for succeeding terms of five years each provided, the lessee drill at least two wells, or that the second well is being drilled at the expiration of said lease. Said procedure to continue for each succeeding five year period until three wells have been drilled for each section of land included in the lease. Should the lease be for more than one hundred and sixty acres and less than six hundred and forty acres, the second well may be in the development state at the expiration of the original lease. Such renewals shall be subject to such terms and conditions as may be fixed by law, and the rules and regulations of the State Land Commissioner not in conflict with law. Provided, however, that the annual rental to be charged under the terms of such development and operating lease shall be ten cents per acre per year; and the royalty to be paid to the State of Arizona on the oil and/or gas commercially produced from the said premises under the prospecting and/or development and operating lease shall be twelve and one-half per centum of oil and/or gas produced from said land.

Section 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved November 15, 1927."

Appendix 4

**Arizona's Current
Mineral Leasing Law
(Ariz. Rev. Stat. §§ 27-231-238)**

**"§ 27-231. Location of mineral claim on state land;
definition**

A. Any natural person over eighteen years of age and any other person qualified to transact business in this state who discovers a valuable mineral deposit on any state land may enter upon and locate the deposit as a mineral claim.

B. The term "mineral" includes mineral compound and mineral aggregate.

**§ 27-232. Methods of locating claims; extent of
extralateral rights**

A. If the mineral deposit is a vein, lode or ledge, it may be located in the manner provided for the location of mineral claims upon the public domain of the United States. Upon obtaining a lease on land so located, as provided in this article, the lessee shall be entitled during the term of the lease to extralateral rights in the discovery vein only to the same extent as similar mineral locations upon the public domain of the United States under the provisions of Title 30, United States Code, section 26 (U.S. revised statutes, section 2322).

B. Any mineral claim, however, may be located in conformity with the lines of the public land survey, embracing not more than twenty acres. In such case the location shall be marked upon the ground by erecting a monument or placing a post extending at least three feet above the surface of the ground at each angle corner of the claim, as nearly as possible, and by placing in each monument, or on each post, a memorandum stating the name of the locator,

the name of the claim and designating the corner by reference to cardinal points, and within thirty days thereafter by filing for record in the office of the county recorder of the county in which the claim is located, a notice of location which shall set forth:

1. The name of the locator.
2. The name of the claim.
3. The date of location.
4. The legal description of the land claimed.

C. One copy of the location notice of any claim located pursuant to this section, together with the county recorder's certificate of recordation, shall be filed in the office of the state land commissioner within thirty days after the date of location.

**§ 27-233. Preferred right of locator to lease land;
discovery work; lease renewal**

A. The locator of a lode mining claim or claims on state lands pursuant to this article shall have a preferred right to a mineral lease of each claim within ninety days after the date of location.

B. The locator of a lode mining claim located pursuant to § 27-232 shall be required to perform the discovery work required by law for mining claims under the laws of the United States within the ninety-day period or an equivalent amount of development drilling of a reasonable value of one hundred dollars on each claim. The development drilling may be centrally located and need not be upon each individual claim, but shall be so located as to be part of a plan of development for the group, and in no event shall the minimum requirement prescribed for each individual claim be dispensed with. The locator shall not receive a lease

unless he submits to the state land commissioner satisfactory proof of the performance of such discovery work within such reasonable time as the land commissioner prescribes.

C. Upon application to the commissioner, not less than thirty nor more than sixty days prior to the expiration of the lease, the lessee of mineral lands, if he is not delinquent in the payment of rental or royalty on the date of expiration of the lease, shall have a preferred right to renew the lease bearing even date with the expiration of the old lease for a term of twenty years.

§ 27-234. Rent; royalty; termination of lease by lessee

A. The rental for a mineral lease of state lands shall be fifteen dollars per annum, payable in advance at the time of application for lease and at the beginning of each yearly period thereafter.

B. Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five percent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

C. The lessee of any mineral lease may, if not delinquent in the payment of rent or royalty to the date of termination, terminate the lease at any time during its term by giving the commissioner thirty days' notice of termination in writing.

§ 27-235. Terms of lease

A. Every mineral lease of state lands shall be for a term of twenty years.

B. The lease shall confer the right:

1. To extract and ship minerals, mineral compounds and mineral aggregates from the claim located within planes drawn vertically downward through the exterior boundary lines thereof. In case of leases made pursuant to locations under subsection A of § 27-232, the lease shall confer extralateral rights in the discovery vein similar to those given locators upon the public domain of the United States under the provision of Title 30, United States Code, § 26 (U.S. revised statutes, section 2322).

2. To use as much of the surface as required for purposes incident to mining.

3. Of ingress to and egress from other state lands, whether or not leased for purposes other than mining.

C. Every mineral lease of state lands shall provide for:

1. The performance of annual labor, as required by the laws of the United States, upon each claim or group of claims in common ownership, commencing at the expiration of one year from the date of location, and for furnishing proof thereof to the commissioner.

2. The fencing of all shafts, prospect holes, adits, tunnels and other dangerous mine workings for the protection of live stock.

3. The construction of necessary improvements and installation of necessary machinery and equipment with the right to remove it upon expiration, termination or abandonment of the lease, if all monies owing to the state under the terms of the lease have been paid.

4. The cutting and use of timber and stone upon the claim, not otherwise appropriated, for fuel, construction of necessary improvements, or for drains, roadways, tramways, supports, or other necessary purposes.

5. The right of the lessee and his assigns to transfer the lease.

6. Termination of the lease by the commissioner upon written notice specifically setting forth the default for which forfeiture is declared, and preserving the right to cure the default within a stated period of not less than thirty days.

§ 27-236. Suspension of royalty rights

The commissioner may, if he deems it in the interest of the state, subordinate the royalty rights of the state under this article, or suspend the operation thereof or of any lease executed under the provisions of this article, in favor of the United States or any agency thereof, for the purpose of facilitating extension of financial aid under the laws of the United States in the development or operation of any mine located upon state lands.

§ 27-237. Review by commissioner

All questions arising between a locator or lessee and the commissioner under this article shall be subject to review as in other cases involving state lands, and the locator's or lessee's right to possess and operate his claim shall continue until the question is finally determined.

§ 27-238. Existing leases

Every mineral lease in effect on June 16, 1941 under the provisions of § 2973, Revised Code of 1928, shall remain in effect for the unexpired term for which it was granted, without right of renewal, or, at the option of the lessee, may be superseded by a lease as provided by this article."

No. 87-1681

(10)

Supreme Court, U.S.
FILED
NOV 23 1988
JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

**ASARCO INCORPORATED, CAN-AM CORPORATION,
MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,**
Petitioners,

v.

FRANK and LORAIN KADISH, et al.,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Arizona

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED APRIL 8, 1988
CERTIORARI GRANTED OCTOBER 11, 1988**

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NOTE: The following opinions, judgments and orders have been omitted in the printing of this Joint Appendix because they appear on the following pages in the appendices to the Petition for Certiorari filed on April 8, 1988:	

	Page of the Petition
Opinion of the Supreme Court of Arizona	1a
On page 10a of the opinion of the Arizona Supreme Court there is a typographical error. The word "not" in line 4 should read "now".	
Opinion of the Superior Court of Arizona, Maricopa County	37a
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IN THE SUPERIOR COURT OF THE
STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. C-433745
9/27/85

FRANK and LORAIN KADISH; MARION L. PICKENS; and
the ARIZONA EDUCATION ASSOCIATION, a nonprofit corp.,
Plaintiffs,

vs.

ARIZONA STATE LAND DEPARTMENT, an agency of the
State of Arizona; ROBERT LANE, in his capacity as the
State Land Commissioner; and CYPRUS PIMA MINING
COMPANY, on behalf of itself and others similarly situated,

Defendants.

DOCKET ENTRIES

Date Filed	Item No.	Filings—Proceedings
Apr. 16, 1981	1	COMPLAINT
May 8, 1981	2	SUMMONS
May 22, 1981	3	ANSWER OF CYPRUS PIMA MINING COMPANY
June 26, 1981	4	ASARCO'S MOTION TO INTERVENE
June 26, 1981	5	ASARCO'S FIRST MOTION TO DISMISS
July 2, 1981	6	MOTION TO DISMISS

Date Filed	Item No.	Filings—Proceedings
July 24, 1981	7	PLAINTIFFS' MEMORANDUM IN RESPONSE TO ASARCO'S MOTION TO INTERVENE
July 24, 1981	8	PLAINTIFFS' MEMORANDUM IN RESPONSE TO FIRST MOTION TO DISMISS OF ASARCO AND CYPRUS PIMA MINING CO.
July 28, 1981	9	MAGMA COPPER COMPANY'S MOTION TO INTERVENE
July 28, 1981	10	MAGMA COPPER COMPANY'S FIRST MOTION TO DISMISS
Aug. 3, 1981	11	ANSWER
Aug. 13, 1981	12	PLAINTIFFS' MEMORANDUM IN RESPONSE TO MAGMA COPPER COMPANY'S MOTION TO INTERVENE AND FIRST MOTION TO DISMISS
Aug. 13, 1981	13	ASARCO'S REPLY TO PLAINTIFFS' RESPONSE TO ASARCO'S MOTION TO INTERVENE
Aug. 13, 1981	14	ASARCO'S REPLY TO PLAINTIFF'S RESPONSE TO ASARCO'S FIRST MOTION TO DISMISS
Aug. 14, 1981	15	MAGMA'S REPLY TO PLAINTIFF'S RESPONSE TO MAGMA'S MOTION TO INTERVENE AND FIRST MOTION TO DISMISS
Apr. 21, 1982	16	SEPARATE ANSWER OF ASARCO
May 11, 1982	17	NOTICE OF ASSOCIATION OF COUNSEL
May 14, 1982	18	SEPARATE ANSWER OF MAGMA COPPER COMPANY
June 10, 1982	19	LETTER

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June 21, 1982	20	CREDIT MEMO
July 12, 1982	21	ORDER
Aug. 30, 1982	22	MOTION FOR WITHDRAWAL OF COUNSEL
Aug. 30, 1982	23	ORDER
Aug. 30, 1982	24	ORDER UNSIGNED
Aug. 30, 1982	25	LETTER
Aug. 30, 1982	26	STIPULATION
Dec. 9, 1982	27	PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT ROBERT LANE, ACTING STATE LAND COMMISSIONER
Jan. 21, 1983	28	PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO INTERVENOR MAGMA COPPER COMPANY
Jan. 21, 1983	29	PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO INTERVENOR ASARCO, INCORPORATED
Jan. 21, 1983	30	PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO DEFENDANT CYPRUS PIMA MINING COMPANY
Feb. 16, 1983	31	RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS
Feb. 17, 1983	32	ASARCO'S MOTION FOR PROTECTIVE ORDER

Date Filed	Item No.	Filings—Proceedings
Feb. 18, 1983	33	CYPRUS PIMA MINING COMPANY'S OBJECTIONS TO PLAINTIFFS' FIRST SET OF NON-UNIFORM INTERROGATORIES TO CYPRUS PIMA AND TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS FROM CYPRUS PIMA
Feb. 18, 1983	34	CYPRUS PIMA MINING COMPANY'S MOTION FOR PROTECTIVE ORDER
Feb. 23, 1983	35	MAGMA COPPER COMPANY'S MOTION FOR PROTECTIVE ORDER
Feb. 24, 1983	36	ASARCO INCORPORATED'S OBJECTIONS TO PLAINTIFFS' FIRST SET OF NON-UNIFORM INTERROGATORIES TO ASARCO INCORPORATED AND TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS TO ASARCO INCORPORATED
Feb. 28, 1983	37	RESPONSE TO MOTIONS FOR PROTECTIVE ORDERS AND TO OBJECTIONS OF DEFENDANT CYPRUS PIMA MINING COMPANY
Mar. 22, 1983	38	LETTER
Mar. 30, 1983	39	STIPULATION
Apr. 14, 1983	40	CYPRUS PIMA MINING CO.'S MOTION FOR SUBSTITUTION OF COUNSEL
May 26, 1983	41	MOTION TO CERTIFY CLASS ACTION
June 17, 1983	42	LETTER

Date Filed	Item No.	Filings—Proceedings
June 23, 1983	43	CYPRUS PIMA'S RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION
July 6, 1983	44	PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THE MOTION TO CERTIFY CLASS ACTION
July 7, 1983	45	SUPPORTING AFFIDAVIT OF MICHAEL D. MARTIN
Sep. 6, 1983	46	LETTER
Sep. 30, 1983	47	PROPOSED FORM OF CLASS CERTIFICATION ORDER AND PLAN FOR NOTICE TO CLASS
Oct. 11, 1983	48	CYPRUS PIMA'S OBJECTIONS TO PROPOSED FORM OF CLASS CERTIFICATION ORDER AND PLAN FOR NOTICE TO CLASS
Oct. 24, 1983	49	PLAINTIFFS' REPLY TO CYPRUS PIMA'S OBJECTIONS
Nov. 21, 1983	50	CYPRUS PIMA'S REPLY RE PROPOSED CLASS CERTIFICATION ORDER AND NOTICE
Dec. 5, 1983	51	REQUEST FOR LEAVE TO FILE REPLY
Jan. 3, 1984	52	STIPULATION
Jan. 30, 1984	53	LETTER
Jan. 30, 1984	54	REPLY TO CYPRUS PIMA'S SECOND RESPONSE
Jan. 30, 1984	55	NOTICE OF CLASS ACTION CERTIFICATION
Jan. 30, 1984	56	ORDER CERTIFYING CLASS ACTION AND DIRECTING NOTICE

Date Filed	Item No.	Filings—Proceedings
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Feb. 14, 1984	58	AFFIDAVIT
Feb. 14, 1984	59	ASARCO'S RESPONSE TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
Feb. 21, 1984	60	MOTION TO EXTEND TIME FOR RESPONSE TO MOTION TO INTERVENE
Mar. 5, 1984	61	CYPRUS PIMA'S RESPONSE TO PLAINTIFFS' FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
Mar. 16, 1984	62	EISENHOWER MINING COMPANY'S MOTION TO INTERVENE
Mar. 16, 1984	63	SEPARATE ANSWER OF EISENHOWER MINING COMPANY
Mar. 19, 1984	64	MOTION FOR RECONSIDERATION
Mar. 23, 1984	65	AFFIDAVIT
Mar. 23, 1984	66	RESPONSE TO THE MOTION FOR RECONSIDERATION
Mar. 26, 1984	67	RESPONSE TO EISENHOWER MINING COMPANY'S MOTION TO INTERVENE
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Apr. 13, 1984	69	SEPARATE ANSWER OF JAMES P. L. SULLIVAN
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May 7, 1984	75	PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
May 8, 1984	76	REPLY IN SUPPORT OF CAN-AM CORPORATION'S MOTION TO INTERVENE
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June 8, 1984	81	STIPULATION AND ORDER
June 21, 1984	82	APPENDIX TO MAGMA COPPER COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
June 21, 1984	83	MAGMA COPPER COMPANY'S RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
June 22, 1984	84	PLAINTIFFS' RESPONSE TO MAGMA'S MOTION FOR SUMMARY JUDGMENT

Date Filed	Item No.	Filings—Proceedings
June 22, 1984	85	OPPOSITION TO ASARCO AND EISENHOWER MOTION TO DISMISS
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July 19, 1984	86	CYPRUS PIMA'S SUPPLEMENTAL RESPONSE TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS
July 23, 1985	87	STATE DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND REPLY TO PLAINTIFFS' RESPONSE TO MOTIONS TO DISMISS BY INTERVENORS MAGMA, ASARCO AND EISENHOWER
Aug. 2, 1985	88	ASARCO INCORPORATED'S AND EISENHOWER MINING COMPANY'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS
Aug. 6, 1984	89	PLAINTIFFS' REPLY TO MAGMA RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT
Sep. 24, 1984	90	REQUEST FOR EXTENSION OF TIME FOR MOTION TO SET
Jan. 2, 1985	55M	MINUTE ENTRY ON MOTION FOR SUMMARY JUDGMENT
Feb. 28, 1985	91	STIPULATION FOR SUBSTITUTION OF COUNSEL AND ORDER
Mar. 6, 1985	92	NOTICE OF SUBSTITUTION OF COUNSEL

Date Filed	Item No.	Filings—Proceedings
June 4, 1985	93	ORDER
June 4, 1985	94	STIPULATION AND ORDER
July 22, 1985	95	JUDGMENT
July 23, 1985	96	OBJECTION TO PROPOSED JUDGMENT
Aug. 19, 1985	97	NOTICE OF APPEAL
Aug. 19, 1985	98	BOND FOR COSTS ON APPEAL BOND #927 58 84
Aug. 26, 1985	99	DESIGNATION REGARDING TRANSCRIPT
Oct. 15, 1985	100	APPENDIX TO MAGMA COPPER COMPANY'S MOTION FOR SUMMARY JUDGMENT [Dated May 7, 1984] (Original unavailable from microfilm and hard copy filed. Copy submitted by the attorneys for Intervenor Magma Copper Company).
Oct. 18, 1985	101	MAGMA COPPER COMPANY'S MOTION FOR SUMMARY JUDGMENT [Dated May 7, 1984] (Original unavailable from microfilm and hard copy file. Copy submitted by the attorneys for Intervenor Magma Copper Company).
May 26, 1988		ORDER and JUDGMENT UNDER SEPARATE COVER, WITH LETTER OF CERTIFICATION, ARE MINUTE ENTRIES PAGES 1 THROUGH 59. SUBMITTED IN BOOK FORM
Aug. 2, 1984	1	MAGMA COPPER COMPANY'S REPLY TO PLAINTIFFS' RESPONSE TO MAGMA'S MOTION FOR SUMMARY JUDGMENT

IN THE ARIZONA COURT OF APPEALS
DIVISION ONE

Case No. 1-CA-CIV-8616

Date	FILINGS—PROCEEDINGS
1985	
10/29	RECORD ON APPEAL (Instruments (three parts), (1 vol. submitted in Book form, filed 8/2/84) : Minute Entries) : \$500 cost bond, filed 8/19/85) :
10/29	SUPPLEMENTAL INDEX
10/29	ADDITIONAL INSTRUMENT, filed 10/15/85, Sup Ct. RE: Magma Copper Companys Motion for Summary Judgment
10/29	ADDITIONAL INSTRUMENT, filed 10/15/85, Sup Ct. RE: Magma Copper Companys Motion for Summary Judgment
10/29	ADDITIONAL INSTRUMENT, filed 8/2/84, Sup Ct. RE: Magma Copper Companys reply to Plaintiffs response to Magma's Motion for Summary Judgment
10/31	NOTICE TO COUNSEL (12/2/85)
11/29	APPELLANTS OPENING BRIEF(7) (1/3/86)
12/31	STIPULATION ON BRIEFING SCHEDULE-ORDER that the appellees shall have until January 31, 1986 to mail their briefs to the Court and to all other parties, and that the Appellants shall have until March 3, 1986 to mail their reply brief to the Court and to all other parties. (Chief Judge Froeb) (1/31/86) (3/3/86)
1986	
1/30	ANSWERING BRIEF OF DEFENDANT APPELLEE CYPRUS PIMA MINING COMPANY AND INTERVENORS APPELLEES ASARCO INCORPORATED AND EISENHOWER MINING COMPANY (7) (2/19/86)

Date	FILINGS—PROCEEDINGS
1986	
1/31	STATE APPELLEES BRIEF (7) (2/20/86)
1/31	ANSWERING BRIEF OF INTERVENOR APPELLEE MAGMA COPPER COMPANY (7) (2/20/86)
1/31	ANSWERING BRIEF OF CAN AM CORPORATION (7) (2/20/86)
2/3	Copy of letter, 1/29/86, to Howard A. Twitty, RE: length of briefs from Assistant Director of Arizona Center for Law in the Public Interest, David S. Baron
2/3	Letter, 1/31/86, to Clerk of the Court, RE: length of briefs, and the above letter, mentioning the length of briefs, exceeding page limit, from Howard A. Twitty
3/3	APPELLANTS' REPLY BRIEF (7) AT ISSUE (3/3/86)
3/3	REQUEST FOR ORAL ARGUMENT (Appellants)
3/4	AT ISSUE NOTICE TO COUNSEL w/PROCEDURE B
3/7	REQUEST FOR ORAL ARGUMENT (Intervenor Appellee, Magma Copper Co)
4/4	PETITION FOR TRANSFER TO SUPREME COURT (Arizona Center for Law in the Public Interest) (Appellant)
4/24	ASC, M.E., 4/23/86, ORDERED: Petition for Transfer to Supreme Court GRANTED. CV-86-0238-T (formerly T-86-0007-CV)
4/25	Letter, 4/25/86, pursuant to letter of 4/22/86, Petition for Transfer GRANTED, record to ASC

Date	FILINGS—PROCEEDINGS
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1987	
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12/11	ASC OPINION(REVERSED AND REMANDED) Stanley G. Feldman, Vice Chief Justice, CONCURRING: Frank X. Gordon, Jr., Chief Justice, William A. Holohan, DISSENTING: James Duke Cameron, Justice
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1988	
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2/9	ASC, M.E. 2/3/88, to Clerk of Mar Cty Superior Court, enclosing Mandate with a copy of Opinion handed down by this Court in the above referenced matter. We are returning your record as follows: CV-86-0238-T
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IN THE SUPREME COURT OF ARIZONA

Case No. CV-86-0238-T/AP

Date/ Init	Item	FILINGS—PROCEEDINGS
4/03/86 jr	1	Petition for transfer to Supreme Court [Appellants Kadish/Pickens/AZ Ed Assn]
4/04/86 jr	2	Response Opposing Petition for Transfer to Supreme Court [Appellees Cyrus Pima Mining/ASARCO/Magma Copper/Eisenhower Mining]
4/14/86 jr	3	Appellants' Reply In support of Petition for Transfer [Kadish/Pickens]AZ Ed Assn]
4/22/86 jr	4	ORDERED: Petition for Transfer to Supreme Court—GRANTED
4/28/86 jr	5	Request for Oral Argument [Appellees Cyrus Pima Mining/ASARCO/Magma Copper/Eisenhower Mining]
7/23/86 kk	6	Motion of the New Mexico Commissioner of Public Lands, Jim Baca, for Leave to File Amicus Curiae Brief [Brief Rec'd]
7/25/86 kk	7	ORDERED: Motion is granted [WAH] [See Dkt #6]
7/25/86 kk	8	AMICUS CURIAE BRIEF OF THE NEW MEXICO COMMISSIONER OF PUBLIC LANDS, JIM BACA
8/21/86 ds	9	MEMO TO FILE: Counsel notified by telephone of OA—October 17, 1986, at UofA, Tucson
9/08/86 ds	10	Motion for Allowance of Attorneys' Fees [Appellants Kadish/Pickens/Az Education Assn]

Date/ Init	Item	FILINGS—PROCEEDINGS
9/12/86	11 ds	Stipulation for Extension of Time
9/12/86	12 ds	Motion for Extension of Time [Appellee Az State Land Dept]
9/16/86	13 ds	The court having reviewed Defendant-Appellee Arizona State Land Department's Motion for Extension of Time in connection with its Response to Motion for Allowance of Attorney's Fees, as well as
9/16/86	13A ds	the Stipulation for Extension of Time filed by Plaintiffs-Appellants and Defendant-Appellee Arizona State Land Department, IT IS ORDERED granting the Motion for Extension of
9/16/86	13B ds	Time. FURTHER ORDERED that the Response to Motion for Allowance of Attorneys' Fees will be filed on or before 9/26/86. FURTHER ORDERED that Plaintiffs-Appellants may have until 10/2/86 to
9/16/86	13C ds	reply to Response. [WAH]
9/16/86	14 ds	NOTICE OF ORAL ARGUMENT: Set for Friday, October 17, 1986, at 10:00 a.m. at the COLLEGE OF LAW, UNIVERSITY OF ARIZONA, TUCSON [25 min per side]
9/16/86	15 ds	Application for Permission to File a Response to the Amicus Curiae Brief of the New Mexico Commissioner of Public Lands
9/16/86	15A ds	[Appellees Cyprus Pima Mining Co/ASARCO Incorp/Eisenhower Mining Co/Magma Copper Co/Sullivan/Can-Am Corp]

Date/ Init	Item	FILINGS—PROCEEDINGS
9/18/86	16 ds	IT IS ORDERED granting Defendants-Appellees' "Application for Permission to File a Response to the Amicus Curiae Brief of the New Mexico Commissioner of Public Lands". [WAH]
9/18/86	17 ds	Response to Amicus Curiae Brief of the New Mexico Commissioner of Public Lands [Appellees Cyprus Pima Mining Co/ASARCO Incorp/Eisenhower Mining Co/Magma Copper Co/Sullivan/Can-Am Corp]
9/24/86	18 kk	Motion of Amicus Curiae for Leave to File a Reply Brief [NM Comm of Public Lands]
9/26/86	19 kk	ORDERED: Motion is denied. [See Dkt #18]
9/26/86	20 kk	Response to Motion for Allowance of Attorney's Fees [Appellees Az State Land Dept]
10/02/86	21 kk	Reply in Support of Motion for Allowance of Attorneys' Fees [Appellants Kadish/Pickens/Az Ed Assn]
10/17/86	22 ls	Oral Argument—submitted for decision en banc
12/10/87	23 ls	OPINION—The judgment of the trial court is reversed. The case is remanded with instructions. (Feldman); Justice James Moeller did not participate in the determination of this matter; Dissent (Cameron)
12/10/87	23A ls	Opinion Distribution List [T 12/28/87]
12/21/87	24 jh	Appellants' Statement of Costs [Kadish/Pickens/AZ Ed Assn] [T 1/4/88]
12/24/87	25 jh	Motion for Reconsideration on the Issue of Attorneys' Fees [Appellants Kadish/Pickens/AZ Ed Assn] [T 1/12/87]

Date/ Init	Item	FILINGS—PROCEEDINGS
1/12/88 jd	26	State's Response to Motion for Reconsideration on the Issue of Attorney's Fees [Appellee]
1/25/88 kk	27	Motion for Leave to File Reply [Appellants Kadish] [Reply Rec'd]
2/02/88 pr	28	ORDERED: Motion for Reconsideration on the Issue of Attorneys' Fees [Appellants Kadish/Pickens/AZ Ed Assn]—DENIED. FURTHER ORDERED: Motion for Leave to File Reply [Appellants Kadish]—GRANTED. Justice Moeller did not participate in the
2/02/88 pr	28A	determination of this matter.
2/02/88 pr	29	Reply in Support of Motion for Reconsideration on the Issue of Attorney's Fees [Appellants Kadish et al] [permission granted 2/2/88]
2/03/88 pr	30	MANDATE Issued Mandate and copy of Opinion together with record to the trial court.
2/03/88 pr	30A	
4/25/86 jr	999	*****
4/25/86 jr	999A	Record on Appeal: MCSC: Instruments (4 parts—part 4 in 3 books); Minute Entries; CofA: Instruments; Appellants' Opening Brief (7); Answering Brief of Def-Appellee Cyprus Pima Mining
4/25/86 jr	999B	Co. & Intervenors-Appellees ASARCO Inc. & Eisenhower Mining Co. (7) State Appellees' Brief (7); Answering Brief of Intervenor-Appellee Magma Copper Company (7); Answering Brief of Can-Am Corp

Date/ Init	Item	FILINGS—PROCEEDINGS
4/25/86 jr	999C	(7) Answering Appellants' Reply Brief (7)
2/03/88 pr	999	Record return to the trial court: Instr (4 parts [part 4 in 3 books]); MEs

SUPREME COURT OF THE UNITED STATES

No. 87-1661

ASARCO INCORPORATED, *et al.*,
Petitioners

v.

FRANK KADISH, ET UX., *et al.*

ORDER ALLOWING CERTIORARI

Filed October 11, 1988

The petition herein for a writ of certiorari to the Supreme Court of Arizona is granted.

October 11, 1988

Justice O'Connor took no part in the consideration or decision of this petition.

Supreme Court, U.S.

FILED

NOV 23 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION,
MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,
v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Arizona

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November 23, 1988

6APP

QUESTION PRESENTED

The initial grant of federal lands to Arizona in the New Mexico-Arizona Enabling Act of 1910, which excludes mineral lands, requires that, prior to sale or long-term lease, granted lands first be appraised and then disposed of at no less than appraised value. The Jones Act of 1927, which grants mineral lands to some thirteen western states including Arizona, prohibits sale of such lands but authorizes the lease of mineral deposits "by the State as the State legislature may direct." Subsequent amendments to the 1910 Act similarly authorize the Arizona Legislature to determine the manner in which lands containing later-discovered minerals, which were held by this Court to pass to the state under the 1910 Act, may be leased for mineral purposes. Since 1941, an Arizona statute has authorized the leasing of all state lands for mineral purposes, including those granted to the state by the federal government, in return for payment of a uniform royalty of five percent. The question presented is whether, as the Arizona Supreme Court has held, the Arizona statute is invalid because it does not include the appraisal requirements imposed by the 1910 Enabling Act.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Arizona were Frank and Lorain Kadish, Marion L. Pickens, and the Arizona Education Association, plaintiff-appellants; the Arizona State Land Department, an agency of the State of Arizona, Joe T. Fallini, in his capacity as the State Land Commissioner (since succeeded by M. Jean Hassell), and Cyprus Pima Mining Company, on behalf of itself and others similarly situated, defendant-appellees; ASARCO Incorporated, Magma Copper Company, James P.L. Sullivan, Eisenhower Mining Company, Can-Am Corporation, intervenor-appellees; and the New Mexico Commissioner of Public Lands, amicus curiae.

The petitioners are ASARCO Incorporated, Can-Am Corporation, Magma Copper Company, and James P.L. Sullivan.*

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* The listings for ASARCO Incorporated and Can-Am Corporation required by Rule 28.1 of the Rules of this Court are at page ii of the Petition for Certiorari, filed on April 8, 1988.

The subsidiaries of Magma Copper Company, except wholly owned subsidiaries, are San Manuel Arizona Railroad Company and Magma Arizona Railway Company. Magma Copper Company is approximately fifteen percent owned by Newmont Mining Corp. and approximately seventeen percent owned by Gold Fields American Corp., each of which has numerous subsidiaries and affiliates that this petitioner has not undertaken to list.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1661

ASARCO INCORPORATED, CAN-AM CORPORATION,
MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,
v.FRANK and LORAIN KADISH, *et al.*,
*Respondents.*On Writ of Certiorari to the
Supreme Court of the State of Arizona

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (Pet. 1a-36a) is reported at 747 P.2d 1183. The opinion of the trial court, the Superior Court of Maricopa County (Pet. 37a-39a), is unreported.

JURISDICTION

The final judgment of the Supreme Court of Arizona was entered on December 10, 1987. (Pet. 1a.) Respondents' timely motion for reconsideration of their claim for attorney's fees against the state defendants was denied on February 2, 1988. (Pet. 44a.) On February 25, 1988, Justice O'Connor granted petitioners' protective application for an extension of time, to and including April 8, 1988, within which to file the petition. The petition was filed on April 8, 1988, and was granted on October 11, 1988. The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

STATUTES INVOLVED

The relevant statutes are the Jones Act of 1927, Pub. L. No. 570, ch. 57, § 1, 44 Stat. 1026, codified as amended at 43 U.S.C. § 870; the New Mexico-Arizona Enabling Act of 1910, as amended, Pub. L. No. 219, ch. 310, §§ 24, 28, 36 Stat. 557, 572, 574; Act of June 5, 1936, ch. 517, 49 Stat. 1477; Act of June 2, 1951, ch. 120, 65 Stat. 51; and Ariz. Rev. Stat. Ann. § 27-234(B) (1976 and Supp. 1987). They are reproduced in the Statutory Appendix to this brief.

STATEMENT

Introduction. For almost fifty years, in reliance on the Jones Act of 1927 and cognate amendments of the New Mexico-Arizona Enabling Act of 1910, which respectively authorize the lease of mineral deposits "by the State as the State legislature may direct" and "in such manner as the Legislature of the State of Arizona may prescribe," Arizona has by statute leased its lands for mineral purposes, charging a uniform five percent royalty on the net value of the minerals extracted. Respondents challenge the state royalty statute because it requires neither an appraisal of each area before it is offered for mining nor leasing of mineral deposits for not less than the value so ascertained. They claim that these requirements, which are imposed by the original Enabling Act, govern mineral leases both in the lands granted to the state by the Jones Act and in lands containing later-discovered minerals that were held by this Court to pass to the state under the Enabling Act of 1910.

Federal School Land Grants. Two federal statutes grant substantial acreage of public land to Arizona: the New Mexico-Arizona Enabling Act of 1910, which authorized the Territory of Arizona to form a state government and join the Union, and the Jones Act of 1927, which expressly grants to Arizona mineral lands that had

been excluded from the earlier grant.¹ Both federal grants require the state to use any proceeds the state derives from those lands for the support of the state's public schools.² There is no dispute in this case that the proceeds have been so used.

The grant to Arizona in 1910 was for the same purpose as grants of land Congress had made to other western states. Since the passage of the Northwest Ordinance of 1789, ch. 8, 1 Stat. 50, it has been the practice of Congress to grant a portion of land within the borders of a newly entering state for the state to use in support of its public schools. In addition to promoting education, the purpose of those federal school land grants was to put the public land states on an equal footing with the original thirteen states, which owned their lands outright, and to increase the state's tax base, as federal property is not taxable by a state.³

Separate, virtually identical sections of the New Mexico-Arizona Enabling Act of 1910 deal with lands granted to New Mexico and Arizona, respectively. By Section 24 of the act, 36 Stat. 557, 572, Congress granted to Arizona four numbered sections of land in each township for the new state to use for the education of school children—a total of some 8 million acres.⁴ In accordance with the practice Congress observed in other school land grants, the 1910 grant to Arizona and New Mexico did not include mineral lands. It provided that, if a num-

¹ New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557; Jones Act of 1927, Pub. L. No. 570, ch. 57, § 1, 44 Stat. 1026-27 (codified as amended at 43 U.S.C. § 870).

² 36 Stat. 557, 574; 44 Stat. 1026-27.

³ See Gates, *History of Public Land Law Development* 285-318 (1968); Papasan v. Allain, 478 U.S. 265, 269 n.4 (1986); Andrus v. Utah, 446 U.S. 500, 522-23 (1980) (Powell, J., dissenting).

⁴ In addition to confirming the previous grant of sections 16 and 36 to the Territory of Arizona, the Enabling Act granted to Arizona upon statehood sections 2 and 32 in every township. § 24, 36 Stat. 572. Sections 6 and 10 of the act govern school land grants to New Mexico. 36 Stat. 561, 563.

bered section named in the grant was mineral in character, then the states had the right to select in lieu thereof other, nonmineral lands from the public domain.⁵ (P. 3a, below.)

The grants to Arizona and New Mexico differed in an important respect from the earlier grants to other western states. Because some of the states admitted to the Union before Arizona had permitted the proceeds from the sale of school lands to be wasted or diverted to other uses, Congress in the Enabling Act of 1910 imposed detailed restrictions on the manner in which Arizona (and New Mexico) could dispose of the lands granted to them by that act. See H.R. Rep. No. 152, 61st Cong., 2d Sess. 3 (1910); 45 Cong. Rec. 8227 (1910) (remarks of Sen. Beveridge). Section 28 of the act prohibited Arizona from selling or leasing the granted lands except to the highest bidder at public auction after advertisement in a newspaper of general circulation. It required all "lands, leaseholds, timber, and other products of land" to be appraised to determine their true value "before being offered" for sale or lease and prohibited the state from selling or otherwise disposing of the granted tracts for less than the value so ascertained. As originally enacted, Section 28 also provided that "nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required." 36 Stat. 574 (p. 9a, below).

Arizona accepted the terms of the Enabling Act and joined the Union in 1912 on an equal footing with the earlier states.⁶ Its Constitution contains a rescript of Section 28 as required by Section 20 of the Enabling Act of 1910. See Ariz. Const. art. X, § 4; 36 Stat. 570-71.

⁵ §§ 24, 29, 36 Stat. 572, 575. See also *United States v. Sweet*, 245 U.S. 563, 567-72 (1918).

⁶ See Ariz. Const. art. XX, ¶ 12; S.J. Res. 57, 37 Stat. 39 (1911).

The exclusion of mineral lands from the public land grants to Arizona and other western states generated considerable confusion with respect to title to lands found to contain mineral deposits after the grant to a state of nonmineral school lands had become effective. This Court ultimately ruled that, if land identified as state school land in the granting act was not known to be mineral at the time the title passed to the state, the state's title was not defeated by a subsequent discovery of mineral deposits. *Wyoming v. United States*, 255 U.S. 489, 499-500 (1921).

Factual questions persisted about when minerals were discovered and gave rise to continuing disputes as to whether the federal government or a state or its grantee held title to lands found to contain mineral deposits. About a dozen western states were affected. These states strongly urged that they should enjoy the benefits of the minerals in granted lands just as the eastern states, which had sovereignty over all of the lands within their borders, enjoyed such benefits. Congress responded in 1927 by enacting the Jones Act. Ch. 57, 44 Stat. 1026 (p. 1a, below).

The Jones Act of 1927 was not an amendment of the New Mexico-Arizona Enabling Act of 1910 or any other state's enabling act. It granted to each of the school land grant states, including Arizona, the numbered school sections specified in the respective enabling acts that did not pass to the states because of their known mineral character. It prohibited the states from selling the mineral deposits on the newly granted lands but expressly stated that the mineral deposits "shall be subject to lease by the State as the State legislature may direct." It provided that "the proceeds of rentals and royalties" from the leases should be used in support of the state's public schools. 44 Stat. 1026-27.

In 1936 Congress again took action affecting Arizona's school lands by amending Section 28 of the Enabling Act of 1910. For the original proviso permitting five-year leasing of surface lands without advertisement, Congress

substituted a provision that "nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct" any lands granted by the Enabling Act for grazing and agricultural purposes for up to ten years and for mineral purposes, for up to twenty years. Pub. L. No. 658, ch. 517, 49 Stat. 1477, 1478 (p. 10a, below). In 1951 Congress again amended the same proviso of Section 28 of the Enabling Act of 1910 and authorized the state legislature to lease lands for mineral purposes for up to twenty years "in such manner as [it] may prescribe" even if the lands might also be leased for grazing and agricultural purposes. This amendment also established a separate regime for oil and gas, which authorized the state to enter into leases of indefinite duration for those minerals, with or without advertising, bidding, or appraisement, and at a royalty rate of not less than twelve and one-half percent. Pub. L. No. 44, ch. 120, 65 Stat. 51, 52 (p. 5a, below).

Arizona's Mineral Leasing Program. Nearly all of the minerals mined in Arizona are metallic. Copper and its by-product molybdenum, along with silver and gold, account for ninety-five percent of the total mineral values in the state.⁷ Exploration for and production of these ores and others like them typically require initial reconnaissance of the surface, detailed geological and geophysical surveying and exploratory drilling to locate hidden deposits. Once a deposit is located, pattern drilling and sometimes exploration shafts are needed to delineate the ore body and obtain samples for testing.⁸ Because the metallic minerals indigenous to Arizona are commonly disseminated through volumes of barren rock, the development costs of extracting these ores exceed those asso-

⁷ Department of the Interior, Bureau of Mines, *Minerals in the Economy of Arizona* 6 (1978).

⁸ See generally Congress of the United States, Office of Technology Assessment, *Management of Fuel and Nonfuel Minerals in Federal Lands* 46-52 (1979).

ciated with the hydrocarbon minerals (oil, gas and coal) found in widespread pools and fields in other states.⁹

In 1941 the Arizona Legislature enacted the leasing regime that continues to govern all nonhydrocarbon mineral leases of state lands, including public school lands.¹⁰ Any person who discovers a valuable mineral deposit on state land may locate the deposit as a mineral claim. Ariz. Rev. Stat. Ann. § 27-231(A). The locator will then be eligible to lease the mineral lands from the state if he performs discovery work or development drilling. *Id.* § 27-233. Alternatively, any person may apply for a mineral exploration permit to explore for minerals for a term of one year (renewable for up to five years) and the prospecting rights granted are exclusive. *Id.* §§ 27-251, 27-252(A). The locator of a mineral deposit is accorded a "preferred" right over others to secure a lease from the state that will entitle him to extract the ores, *id.* § 27-233(A), and a prospector operating under a state permit is granted an "exclusive" right to obtain such a lease, *id.* § 27-252(A)(1).

Payments to the state under mineral leases, which are for a term of twenty years, are set by the state statute at five percent of the net value of the minerals extracted, in addition to a nominal annual rental. *Id.* §§ 27-234(A), (B), 27-235(A). The net value to which the royalty applies is the value of the minerals after deducting processing costs, transportation costs and taxes—that is, after deducting the costs the lessee incurs after the minerals reach the earth's surface. Exploration costs, development costs and mining costs may not be deducted. *Id.* § 27-234(B). Arizona has never required appraisal

⁹ See generally 1 Rocky Mountain Mineral Law Foundation, *American Law of Mining* §§ 1.01-1.07 (2d ed. 1988).

¹⁰ Act of March 24, 1941, ch. 78, 1941 Ariz. Sess. Laws 145, codified as amended at Ariz. Rev. Stat. Ann. §§ 27-231-37. Arizona's leasing of oil and gas is governed by a separate statutory regime not at issue in this case. See Ariz. Rev. Stat. Ann. §§ 27-551, et seq.

of the mineral lease areas or that lease payments reflect an appraised value. The state follows those procedures only when it sells or leases nonmineral state lands and surface assets. *Id.* §§ 37-231, 37-236-38, 37-481.

The state legislature's use of a royalty as the principal form of payment to Arizona for mineral extraction on state lands is not uncommon. Under the federal mining laws of 1872, which continue to govern exploration for most metallic minerals including those commonly mined in Arizona, a locator operating on federal lands makes no payments whatsoever to the United States for extracting the ores, after securing a patent at a nominal charge.¹¹ When other laws of the United States or the laws of the states do require a lessee to pay for the extraction of minerals from public lands, they typically require lump sum payments (often called bonuses) or royalties (or profit sharing) based either on the gross or net value of the minerals extracted.¹² Each method has advantages and disadvantages. A uniform or flat rate such as the royalty adopted by the Arizona Legislature for nonhydrocarbon leasing has three significant advantages: predictability for prospective investors, which encourages them to prospect and mine; reduced administrative costs; and revenues tied to the market value of the minerals extracted.¹³

Royalty payments to Arizona's school fund under the state mineral leases have resulted in significant financial benefits for the public schools. During the fiscal year

¹¹ 30 U.S.C. §§ 21-54. See p. 35, below.

¹² See generally, Office of Technology Assessment, *Management of Fuel and Nonfuel Minerals*, *supra* note 8, at 150 (federal laws).

¹³ Cf. 30 U.S.C. §§ 272, 273 (flat five percent royalty for sulfur); 53 Fed. Reg. 28822 (1988) (proposing flat royalty rate on value of coal removed in part to eliminate the cost of individual analysis); Oregon Admin. Rules § 141-71-610 (1988) (flat five percent royalty for "metallics and uranium"); Utah Admin. Code § R632-20-10 (1988) (schedule of fixed royalties for various types of minerals); Washington Admin. Code § 332-16-270(2) (1977) (fixed royalty of three percent unless otherwise specified).

1986-87, a total of \$4,196,252 in mineral rentals and royalties was paid to the State of Arizona by lessees of state mineral lands.¹⁴ These revenues are in line with the revenues that other western states derive from leasing school lands that are mineral-bearing.¹⁵

Proceedings Below. Respondents are named taxpayers and the Arizona Education Association, representing its 20,000 members who are teachers in the Arizona public schools. They initiated this action in 1981 in the Superior Court of Maricopa County naming as defendants the Arizona State Land Department, the State Land Commissioner, and Cyprus Pima Mining Company on behalf of itself and others similarly situated. The complaint alleges that the taxpayer-plaintiffs pay property taxes that are used to support public education and that the Arizona statute governing mineral leases has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." (Complaint ¶ III, J.A. 1.) The 20,000 teacher members of the Association claimed that the challenged state statute has an adverse economic impact on them and that the state's failure to follow the Association's view of what federal law requires adversely affects the "quality of education in Arizona." (Complaint ¶ IV, J.A. 1.) (See Pet. 2a-3a.)

Plaintiffs allege that the Arizona statute authorizing a uniform royalty rate on minerals extracted from leased state lands is repugnant to Section 28 of the New Mexico-Arizona Enabling Act of 1910, as amended, and to article X, § 4, of the Arizona Constitution. They assert that, under Section 28 and the corresponding provision of the state constitution, each leased area must be

¹⁴ Arizona State Land Department, 1986-87 Annual Report 34 (1987).

¹⁵ Office of the Auditor General, *A Performance Audit of the Arizona State Land Dept.*, App. I (1980); Smith, *Elements of Mineral Leasing Systems for State Lands With Comments on the Laws of Selected States* (1980) (unpublished manuscript). (See J.A. 11, filing of Magma Copper Company on 1/31/86, App. IX, X.)

appraised before leasing to determine its true value and lease payments must be set at no less than that value.

Petitioners hold mineral leases on lands that were granted to Arizona by the Jones Act of 1927 and on lands that were held to pass to the state under the Enabling Act of 1910. Along with other mining companies and individual prospectors, they have invested heavily in exploring for and developing nonhydrocarbon ore bodies in the state. The trial court allowed petitioners to intervene as intervenor-defendants, and certified a defendant class of parties consisting of those holding or likely to hold mineral leases on lands the state received from the federal government.

The trial court, on cross motions for summary judgment, granted petitioners' motion. It ruled that the challenged Arizona leasing statute does not violate the New Mexico-Arizona Enabling Act, as amended, or its rescript in the Arizona Constitution. It determined that as a matter of federal law the state legislature had the power to enact the mineral leasing statute. On appeal the federal claim was appropriately preserved and the case was transferred from the court of appeals directly to the Supreme Court of Arizona because of the substantial importance of the issues presented. (Pet. 3a.) In a split decision that court reversed, holding that the Arizona leasing statute contravenes the requirements of the Enabling Act of 1910, as amended, which "forbid the state from making nonhydrocarbon mineral leases without appraisal or for less than their true value." (Pet. 24a.)

The Supreme Court of Arizona concluded that the provision in the Jones Act of 1927 that the grant of mineral sections "shall be of the same effect as prior grants" implicitly incorporated for mineral leases the Enabling Act's requirement of prior appraisal and leasing at true value. (Pet. 10a, 24a.) In addition, in the court's view, the "dramatic revisions" effected by the 1951 amendments to the Enabling Act "greatly reinforce[d]" that conclusion because they showed that Congress in 1951 did not

believe that the Jones Act of 1927 had passed mineral lands to the states free of the appraisal provisions that govern the disposition of lands granted by the state's enabling act. (Pet. 18a.) Finally, the court found language in this Court's decision in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), which involved the lease of grazing land, "fully dispositive" of the issue presented in this case. (Pet. 22a.) The court declared the Arizona royalty statute "void" as repugnant to Section 28 of the 1910 Enabling Act, as amended, and its rescript in article 10 of the Arizona Constitution, and remanded the case to the trial court to enter judgment and determine the proper relief. (Pet. 27a, 29a.) On remand, the trial court declared the Arizona royalty statute invalid.¹⁶

Justice Cameron dissented on the ground that in both the Jones Act of 1927 and in the 1936 and 1951 amendments to the Enabling Act of 1910 Congress "in plain words" had authorized Arizona to lease state mineral lands in such a manner as its legislature might direct. The dissenting Justice noted that, "[b]ecause mineral lands were reserved to the federal government under the Enabling Act, Congress could not have contemplated their inclusion" in the restrictions on the state's leasing of nonmineral lands and surface assets in Section 28 of the Enabling Act of 1910. He further observed that subsequent legislative events showed that Congress affirmed the sole authority of the states over the leasing of school lands that contain mineral deposits. (Pet. 32a & n.2.) He noted the considerable practical difficulties of requiring prior appraisal of mineral deposits, which are "almost impossible to value until after extensive and often expensive exploration," (Pet. 35a) and concluded that, fully consonant with its obligations as a trustee of the

¹⁶ The trial court stated that it would conduct proceedings to grant "such further relief as may be appropriate and to effectuate the principles" of the Arizona Supreme Court's decision. The "special action relief" sought by plaintiffs is relief that formerly was obtained against "a body, officer or person by writs of certiorari, mandamus, or prohibition." See Ariz. R. Proc. Sp. Act. 1.

school lands, "the legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands." (Pet. 36a.)

SUMMARY OF ARGUMENT

When Congress, in 1910, granted lands for public school support to the new states of Arizona and New Mexico it imposed certain restrictions on the ability of those states to sell or lease the granted lands. The restrictions, which were unique to those two states, were designed to ensure that the experience of some states and territories that had squandered or diverted to other purposes proceeds from the disposition of school lands would not be repeated in New Mexico and Arizona. In accordance with customary practice at that time, the grant expressly excluded mineral lands, and the dispositional restrictions in the act could not have been intended to apply to mineral deposits.

Some seventeen years later in passing the Jones Act, Congress changed its long-standing practice and granted mineral lands to Arizona and other western states that had not received those lands in their original grants. The grantee states were prohibited from selling the mineral deposits in the lands but the deposits were made "subject to lease by the State as the State legislature may direct." The plain meaning of the language Congress used in the Jones Act demonstrates that there was an unqualified grant of leasing authority to the states, not limited by any special dispositional restrictions of the kind imposed in the earlier grants of nonmineral lands to the states. The legislative history confirms the language chosen and demonstrates that Congress recognized that by their nature minerals did not lend themselves to prior appraisal and similar dispositional restrictions, that the western states could be counted on to act responsibly in leasing mineral deposits for the benefit of their public school systems and that those states were entitled to have dominion over minerals in parity with that enjoyed by the eastern states.

The Jones Act, which is not an amendment to any enabling act but a free-standing grant by Congress, establishes a regime for the leasing of mineral deposits that is wholly distinct from and independent of the provisions of the Enabling Act of 1910 and all other enabling acts. The court below erred in inferring that the leasing authority granted to Arizona by subsection (b) of that act was significantly restricted by a clause in subsection (a) of the Jones Act, which provides that the grant of mineral lands "shall be of the same effect as prior grants." That clause makes clear that the conveyancing aspects of the grant of mineral lands would operate in the same manner as prior grants of numbered nonmineral sections. If the restrictions in the various western states' enabling acts applied to mineral lands granted by the Jones Act, then Arizona and New Mexico, because of the extensive restrictions imposed by the Enabling Act, would have been placed at a significant disadvantage relative to other western states. In the Jones Act, however, Congress intended no such result. That legislation was designed to place all of the western states on an equal footing with respect to the disposition of mineral lands. Neither the Enabling Act of 1910 nor the amendments to it in 1936 and 1951 apply in any respect to the mineral lands granted to Arizona and other western states by the Jones Act.

No provision was made in the original Enabling Act for the leasing of lands that were not known to be mineral in character when title passed to the states but were later discovered to contain minerals. By virtue of decisions of this Court, title to such lands was held to pass to the states under the original grants, and the lands were leased by Arizona and New Mexico without regard to the restrictions in the Enabling Act. The first action taken by Congress with respect to the minerals in such lands was in 1936. At that time Congress amended Section 28 of the Enabling Act to authorize Arizona to lease for "mineral" purposes lands granted by that act "in a manner as the State legislature may direct." The essen-

tial purpose of the amendment was to fill a hole left by the Jones Act by making clear that Arizona had the same authority over mineral leasing in lands passing under the Enabling Act of 1910 as it had with respect to lands passing under the Jones Act. Neither in the express language of the 1936 amendment nor in its legislative history is there evidence of any intention on the part of Congress to impose dispositional restrictions upon the leasing authority granted.

The 1951 amendments to the Enabling Act of 1910 were principally concerned with establishing a separate regime for hydrocarbons by permitting leases beyond a twenty-year term and prescribing that the state's royalty should be not less than twelve and one-half percent. That amendment further provides that hydrocarbon leases could be made "with or without advertisement, bidding or appraisement." This provision neither enlarged nor restricted the state's leasing authority with respect to nonhydrocarbon minerals. In view of the separate regime for mineral leasing established by the Jones Act and confirmed in the 1936 amendment to the Enabling Act, the central feature of which was a delegation of leasing authority to the states, it would be erroneous to infer from language applicable only to hydrocarbon leases, as the court below did, that the appraisal provisions in the Enabling Act limit the state's authority to lease nonhydrocarbon mineral deposits.

The proper reading of the four acts of Congress that govern this case is that (1) the Enabling Act of 1910 follows the long-standing practice of reserving mineral lands to the federal government, and it establishes, for Arizona and New Mexico, a uniquely restrictive regime for the disposition of nonmineral lands and surface assets granted thereunder that reflects the concerns of that era as to the maturity of the western states, and (2) beginning in 1927 with the Jones Act and continuing with amendments to the Enabling Act in 1936 and 1951 Congress established quite a different regime for the leasing of mineral deposits which reflects confidence in the abil-

ity of the states to act responsibly and a recognition, based largely upon federal experience, that minerals cannot be readily appraised for true value prior to extensive exploration and development. The Arizona statute that provides for the leasing of mineral deposits on a five percent royalty basis constitutes a valid implementation of the broad leasing authority granted the State of Arizona both by the Jones Act and the amendments to the Enabling Act of 1910.

ARGUMENT

I. BOTH THE JONES ACT AND THE ENABLING ACT, AS AMENDED, EXPRESSLY CONFER THE LEASING AUTHORITY EXERCISED BY ARIZONA.

The Jones Act unambiguously provides that mineral deposits "shall be subject to lease by the State as the State legislature may direct." Likewise, Section 28 of the Enabling Act, as amended, most recently in 1951, clearly states that "[n]othing herein contained shall prevent . . . the leasing of any [lands referred to in this section], in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes, . . . for a term of twenty years or less." The meaning of this statutory language is "uncomplicated," *North Dakota v. United States*, 460 U.S. 300, 312 (1983); it vests in the Arizona Legislature authority to lease mineral deposits found in state school lands free of restrictions, including those that Congress chose in the original Enabling Act to apply to the state's disposition of nonmineral school lands. Thus, "[t]he plain meaning of the statute[s] decides the issue presented." *FERC v. Martin Exploration Management Co.*, 108 S. Ct. 1765, 1768 (1988) (quoting *Bethesda Hospital Ass'n v. Bowen*, 108 S. Ct. 1255, 1258 (1988)).

Because the Jones Act and the Enabling Act, as amended, constitute federal grants to the State of Arizona, any restrictions on Arizona's development of the lands granted by these statutes must be clearly expressed. Like a federal grant under the spending power, a school

land grant is a "solemn agreement" between a state and the federal government, with concessions by both sides. *Andrus v. Utah*, 446 U.S. 500, 507 (1980). When conscription of a state rests on the federal government's power to attach conditions to federal grants, this Court has repeatedly required Congress to state its conditions clearly, so that the state will know precisely what rights it must cede by accepting the largess of the federal government. See, e.g., *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 25 (1981). Only clearly expressed restrictions, not implied ones, can bind Arizona.¹⁷

A. The Jones Act Grants to Arizona and Other Western States the Authority to Lease Mineral Deposits as Their Legislatures May Direct.

The Jones Act is the act of Congress that expressly grants mineral lands to Arizona (and other western states). Its language controls the state's disposition of known mineral lands because any restrictions on a state's interest in federally-granted lands "depends on the federal law[] that transferred that interest." *Papasan v. Allain*, 478 U.S. 265, 289-90 n.18 (1986). That language and the structure of the act demonstrate that it did not incorporate expressly or by implication the restrictions of the original Arizona Enabling Act.

The Jones Act transferred mineral lands to the states by extending grants in place for the support of the public schools to "numbered school sections mineral in character," unless the state had selected other lands in lieu thereof. 44 Stat. 1026 (p. 1a, below). Subsection (a) of the act carefully sets forth the manner, time, and effect of the conveyance, stating that "[t]he grant of numbered mineral sections under this section shall be of

¹⁷ See also *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943) ("an unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous"); *United States v. Bass*, 404 U.S. 336, 349 (1971); *FTC v. Bunte Bros.*, 312 U.S. 349, 354-55 (1941).

the same effect as prior grants for the numbered non-mineral sections," and that "titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections." *Id.* (emphasis added). That is, the grant was a separate and independent grant of public lands to the western states, and title would vest in the state upon completion of the federal survey. See *Andrus v. Utah*, 446 U.S. at 507.¹⁸

After describing the nature of the federal conveyance to the states in subsection (a), Congress set forth the restrictions and conditions that apply to the states' subsequent disposition of mineral school lands in a separately lettered subsection (b). That subsection of the act provides:

"[T]he additional grant made by this act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. *The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct*, the proceeds of rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools."¹⁹

In that subsection, Congress prohibits the states from selling school lands without reserving to themselves the valuable mineral deposits in those lands but expressly authorizes the states to lease the minerals so reserved upon such terms and conditions as the state legislatures consider appropriate. The only other express limitation Congress placed on the states is that the royalties and

¹⁸ The federal survey of lands granted to Arizona has extended over many years and is now substantially complete.

¹⁹ 44 Stat. 1026, codified as amended at 43 U.S.C. § 870 (emphasis added).

other proceeds from the leases be used for the support of public schools. Congress listed, clearly and unambiguously, all of the conditions and restrictions governing the states' disposition of the mineral lands granted therein. This Court should "refuse[] to add to this list by divining some 'implicit' congressional intent." *Leo Sheep Co. v. United States*, 440 U.S. 668, 679 (1979).

The Arizona Supreme Court's strained construction of the Jones Act makes the "same effect" language in subsection (a) perform the work of incorporating the original Enabling Act's appraisal and true value restrictions. Such a construction ignores the plain meaning of the statutory language as well as the structure of the act as a whole. The "same effect" language of subsection (a) merely delineates the scope and method of title conveyance as the remaining language of that subsection emphasizes. If Congress had intended the Jones Act to embrace any of the restrictive provisions of the various states' enabling acts, it would have done so in the subsection that specifically sets forth the conditions and restrictions on subsequent conveyances and uses by the states.²⁰ Moreover, the express requirement that the states must use all proceeds derived from mineral leasing for the support of schools would not have been necessary under the reasoning of the court below, because every relevant enabling act was already to that "same effect."²¹

Finally, Congress in Section 2 of the Jones Act as originally enacted demonstrated that when it intended to

²⁰ See *United States v. Naftalin*, 441 U.S. 768, 773-74 (1979) (language in one subsection does not restrict other subsections).

Congress used this same format in the Enabling Act of 1910. It described the nature of the grant to the state in one section (§ 24) and the conditions and restrictions on the state's disposition of the granted lands in another (§ 28).

²¹ See, e.g., Enabling Act of Wyoming, ch. 664, § 5, 26 Stat. 222, 223 (1890); Enabling Act of Idaho, ch. 656, § 5, 26 Stat. 215, 216 (1890); Enabling Act of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 11, 25 Stat. 676, 679-80 (1889); Enabling Act of Utah, ch. 138, § 8, 28 Stat. 107, 109-10 (1894); Enabling Act of Colorado, ch. 139, § 14, 18 Stat. 474, 476 (1875).

incorporate or preserve provisions of a previous enactment it did so not by implication but with clear and unambiguous language. That section concerns the effect of the act on prior land grants and certain in lieu rights that the states would enjoy. It provides that "all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect." 44 Stat. 1027, codified at 43 U.S.C. § 871. Congress' use of similar language concerning the dispositional restrictions in the enabling acts would have been dispositive. But Congress did not use any such language. To read "of the same effect" as doing for the disposition restriction provisions of the enabling acts what the explicit language of Section 2 did for the provisions governing in lieu selections ignores Congress' precision in choice of words.

Other federal grants of land to the states demonstrate that, when Congress intends to incorporate restrictions contained in previous land grants or to qualify the states' legislative authority over granted lands, it will say so clearly. When granting Mississippi new rights with respect to certain in lieu lands, for example, Congress provided that the new lands "shall be helden by the same tenure, and upon the same terms and conditions, in all respects, as the said State now holds lands heretofore reserved for the use of schools in said State." Act of June 23, 1836, ch. 355, § 2, 5 Stat. 116. The absence of any language in the Jones Act qualifying the legislative authority to lease found in subsection (b) or explicitly incorporating the restrictions contained in the original enabling acts provides specific evidence that Congress meant what it said when it gave state legislatures authority over the leasing of mineral deposits. The statutory language providing that mineral lands may be leased "by the State as the State legislature may direct" must be given the meaning it clearly conveys.

B. The Enabling Act, as Amended, Conforms the Treatment of Later-Discovered Mineral Deposits in Arizona School Lands With the Jones Act Grant of Authority to Lease Deposits on Known Mineral Lands as the Legislature May Direct.

The Enabling Act of 1910, as amended, expressly authorizes the Arizona Legislature to lease mineral deposits in lands passing to the state under that act, without regard to the appraisal provisions in that act.

Section 28 of the Enabling Act restricts Arizona in the way it can dispose of lands granted by the act and those lands only. Mineral lands were expressly excluded from the grant. When numbered sections of lands granted to the states "are mineral," the Enabling Act provides that the state may select indemnity lands in lieu thereof, § 24, 36 Stat. 572, and indemnity lands may not be mineral, § 29, 36 Stat. 575. This language makes clear that Congress did not intend to grant any mineral lands to the state under the act. See *United States v. Sweet*, 245 U.S. 563, 572 (1918). Section 28's requirements of prior appraisal and leasing at true value apply only to lands "hereby granted," 36 Stat. 574, and, accordingly, they do not apply to mineral lands, which Congress excluded from the grant.

That Congress did not contemplate imposing leasing restrictions on a state's disposition of mineral deposits is confirmed by other language in Section 28. The section says that lands or leaseholds, "*before being offered*, shall be appraised at their true value" (emphasis added). It is virtually impossible to appraise and determine the "true value" of a mineral deposit '*before offering*' it for private use because its value cannot be known until after a prospector enters on the land and begins to explore and develop it. On its face, the language Congress chose in 1910 is not applicable to the extraction of minerals.

Any doubt as to the inapplicability to mineral leasing of the act's restrictions is resolved by the 1936 amendment of the original Enabling Act. That amendment brought the Arizona provision of the Enabling Act into

accord with the Jones Act by relieving mineral leases of any restrictive appraisal, true-value, and auction requirements that might have been applicable to the disposition of unknown mineral deposits in lands granted by the original act. In amending the proviso in the third paragraph of Section 28 beginning with the words "nothing herein contained," Congress in clear and concise terms specified that the leasing of any mineral lands for a term of twenty years or less should be "in a manner as the State legislature may direct." 49 Stat. 1477-78 (1936) (p. 10a, below).

In 1951 the third paragraph was again rewritten, but to the same effect: "Nothing herein contained shall prevent . . . the leasing of any of [the lands referred to in this section], in such manner as the Legislature of the State of Arizona may prescribe, . . . for mineral purposes . . . for a term of twenty years or less." 65 Stat. 51, 52 (p. 5a, below). The "nothing herein contained" phrase used in both the 1936 and 1951 amendments encompasses all of the provisions of Section 28—including the requirement of appraisal and sale or lease at no less than appraised value in the fourth paragraph as well as the advertising and bidding requirements of the third paragraph—because Section 28 is a unified whole without separately numbered paragraphs and because the Enabling Act contains numerous instances in which Congress used the word "herein" indisputably to refer to provisions in other paragraphs within a single section. See, e.g., Section 28, first and eleventh paragraphs. At the opposite pole from the "nothing herein" language in Section 28 is the language of the Oklahoma Enabling Act of 1906, which shows that when Congress wants to ensure that specified dispositional restrictions limit the authority of a state to lease state mineral lands, it knows how to state that intention clearly. That act provides that the "legislature of the State may prescribe additional legislation governing such leases *not in conflict here-with*." Ch. 3335, § 8, 34 Stat. 267, 273-74 (emphasis added).

The court below, however, viewed the 1951 amendment as "the most dramatic revision[]" of the Enabling Act (Pet. 18a) and gleaned from the special provision Congress then made for hydrocarbon leases an intent to apply the appraisal provisions of the original Enabling Act to other kinds of mineral leases. Because the 1951 amendment did not expressly state that the state legislature might lease nonhydrocarbon minerals "with or without appraisement" as it did say of hydrocarbons, the court concluded that nonhydrocarbon mineral leases were subject to the appraisal provisions of Section 28. This reasoning ignores the indisputable fact that the entire provision of the third paragraph beginning with the words "nothing herein contained shall prevent," retained and reenacted in the 1951 amendment, was intended to free the state from the restrictions that are otherwise applicable to the types of dispositions listed in that section. It also ignores the central fact that Congress in 1951 was specifically focusing on hydrocarbon leases and gave little, if any, considered attention to other types of mineral leasing.

Congress had no occasion in 1951 to enumerate specific restrictions on the leasing of nonhydrocarbon minerals because it was making no significant changes with respect to such leases. Congress chose not to impose any royalty requirement and not to extend the permissible period of leases, as it did with hydrocarbons. Instead, it continued to provide that nonhydrocarbon mineral deposits might be leased "in such manner as the Legislature of the State may prescribe"—thus reenacting substantially the same provision it had approved for all the states in 1927 and specifically for Arizona in 1936. The statutory language demonstrates that Congress in 1951 said nothing that implied that appraisal or other restrictions of Section 28 applied to nonhydrocarbon mineral leases.

II. THE LEGISLATIVE HISTORIES OF THE JONES ACT AND THE ENABLING ACT, AS AMENDED, AND THE CONTEXTS IN WHICH THEY WERE ENACTED CONFIRM THAT ARIZONA'S MINERAL LEASING AUTHORITY IS NOT LIMITED BY THE APPRAISAL PROVISION GOVERNING NONMINERAL LANDS IN THE ORIGINAL ENABLING ACT.

The Jones Act, the Enabling Act, and the acts amending the Enabling Act were each enacted in a context that demonstrates that Congress intended to give the states wide latitude in the leasing of their mineral lands. The meaning that is indicated by the contexts is confirmed by specific evidence in the legislative histories of the acts.

A. The Appraisal Provision of Section 28 of the Enabling Act of 1910 Was Not Intended to and Does Not Govern the Leasing of Minerals.

The requirement in the Enabling Act of 1910 that land and leaseholds, "before being offered, shall be appraised at their true value" was never intended to apply to the state's leasing of mineral lands. The contemporaneous practice of Congress was "to make a distinction between mineral lands and other lands, to deal with them along different lines, and to withhold mineral lands from disposal save under laws specially including them." *Andrus v. Utah*, 446 U.S. 500, 508-509 (1980) (quoting *United States v. Sweet*, 245 U.S. at 567-70).²² Congress did not depart from this practice in the 1910 Enabling Act. (See p. 20, above.) It had no reason to consider what kind of regime Arizona and New Mexico should follow in disposing of mineral lands because those lands were ex-

²² When Congress has granted mineral lands to a state, it has articulated dispositional restrictions applicable to those lands separate and apart from any restrictions it imposed on the grant of other types of land. See, e.g., Enabling Act of Oklahoma, ch. 3335, § 8, 34 Stat. 267, 273-74 (1906).

pressly reserved to the federal government and were subject to the federal mining laws of 1872. 17 Stat. 91.

The contemporaneous practice of both New Mexico and Arizona demonstrates that neither state believed that the Enabling Act's dispositional restrictions applied to mineral leasing of school lands. Under the principles applied by this Court in *Wyoming v. United States*, 255 U.S. 489 (1921), Arizona and New Mexico acquired title to lands in which minerals were discovered after the grant in the Enabling Act became effective. Recognizing that Congress had not made any provision in the Enabling Act for leasing lands of this type, the New Mexico Legislature enacted laws from time to time providing for long-term leasing of the mineral deposits discovered in them without prior appraisal, advertising or public bidding. In 1922 the New Mexico Supreme Court addressed this practice in *Neel v. Barker*, 204 P. 205 (N.M. 1922), and held that such lands passed to the state free of the dispositional restrictions that the Enabling Act imposed on the leasing of agricultural lands and surface assets.

The New Mexico court reasoned that, because Congress did not intend to grant any mineral lands to the state by the Enabling Act of 1910, it "certainly did not contemplate that the state should follow certain formalities in the execution of leases for mineral purposes When Congress used the word 'lease' with respect to lands it considered and denominated as nonmineral, it certainly did not have in mind a mineral lease." 204 P. at 207. See also S. Rep. No. 9, 70th Cong., 1st Sess. 2 (1928).

Like New Mexico, Arizona did not believe that the 1910 Enabling Act restricted its mineral leasing authority over the state's vested school sections. In 1915 the state legislature enacted Arizona Public Land Code § 38, Act of 1915, ch. 5, 2d Sp. Sess., which tracked federal laws governing mining on public lands. The Arizona statute provided that any United States citizen could locate a mineral claim on state lands and receive a lease

to develop the deposit. Prior appraisal of the area, public bidding, and leasing at true value were not required.

These actions by Arizona and New Mexico were at no time challenged by the federal authorities responsible for enforcing the terms of the Enabling Act.²³ Indeed, when Congress specifically addressed the New Mexico practice in 1928 it did not disapprove the reasoning or the result in the *Neel* case, but enacted a joint resolution authorizing a plebiscite through which the citizens of New Mexico could approve the state's mineral leasing practices. The resolution authorized New Mexico to lease mineral lands that passed inadvertently to the state under the 1910 Enabling Act "under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding and containing such terms and provisions, as may be provided by act of the [state] legislature." S.J. Res. 38, ch. 28, 45 Stat. 58 (1928). The citizens of New Mexico approved of this result in the plebiscite. The joint resolution did not amend the New Mexico-Arizona Enabling Act; it simply confirmed the power of the state legislature to allow leasing of mineral lands without appraisal and other dispositional restrictions.

The manner in which New Mexico, Arizona and the Attorney General dealt with minerals in granted lands in the years immediately following passage of the Enabling Act of 1910 is highly significant in determining the intent of Congress. See *Solem v. Bartlett*, 465 U.S. 463, 471 (1984). At all times those authorities proceeded on the entirely reasonable assumption that the state was authorized to develop and lease mineral lands without a prior appraisal of the individual area and a leasing at "true value." These practices are entitled to

²³ The United States Attorney General is expressly empowered to enforce the provisions of the act, § 29, 36 Stat. 575, and has sought injunctions to prevent misuse of school lands or funds in other contexts. E.g., *United States v. Ervien*, 246 F. 277 (8th Cir. 1917), aff'd, 251 U.S. 41 (1919).

"very great respect." *Mountain States Telephone & Telegraph v. Pueblo of Santa Ana*, 472 U.S. 237, 254 (1985).

B. The Jones Act of 1927 Constitutes the Basic Determination by Congress With Respect to the Disposition of Minerals in the Western States, Including Arizona.

By 1927 Congress had recognized that Arizona and the other western states were responsible centers of government; the concerns that prompted the restrictions applicable to the leasing of nonmineral lands in the Enabling Act of 1910 no longer obtained. Congress also recognized that western states were disadvantaged relative to the eastern states, many of which had full control over the lands within their borders and could tax that property for the benefit of their schools or for other purposes. Congress also recognized that mineral lands are different in kind from the lands it previously granted to the western states, necessitating different treatment. These considerations coalesced in 1927 to produce legislation, the Jones Act, that placed the ownership and leasing of mineral lands squarely in the hands of the respective western states.²⁴

1. Congress Recognized That the Western States Could Be Expected to Act Responsibly in Leasing Minerals for the Benefit of Their Public Schools.

In the Enabling Act of 1910, like the enabling acts of other western states, Congress excluded known mineral lands from the grant of numbered school sections in place. The excluded lands were not identified by section, nor were any patents issued to the states for the non-mineral lands that fell within the terms of the various grants. Without any firm evidence of title or any clear designation of which school lands were excluded because

²⁴ The states principally affected by the Jones Act are Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. See generally S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926).

of their mineral character, "there [was] no absolute assurance that the title ha[d] passed to the State[s]." *To Assure Title to Granted School Lands: Joint Hearings on S. 3078 and H.R. 9182 Before the Senate Comm. on Public Lands and Surveys and the House Comm. on the Public Lands*, 69th Cong., 1st Sess. 9 (1926) (hereinafter cited as "Joint Hearings") (testimony of Assistant Secretary of the Interior Finney).

This uncertainty created an "intolerable situation" for the western states. *Id.* at 1 (testimony of Senator Smoot). They were subjected to costly and vexatious litigation, resulting more often than not in the loss of the contested lands. See *id.* at 9, 10, 24. In addition, the cloud upon the states' title to school lands, which continued indefinitely for lack of a statute of limitation, made it difficult for the states to dispose of them, hampering development and depriving the public schools of needed revenues. S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926).

Members of Congress from the western states attempted to dispel these uncertainties as early as 1912, in the 62d Congress, and they continued to press for legislation until the Jones Act was passed in 1927. Four general types of bills were introduced during this period. Some bills purported to confer upon the Interior Department the authority to issue patents to the states for non-mineral lands and provided a procedure by which a state could list with that agency any granted section of land in place to obtain firm assurance of title upon a determination by the Secretary of the Interior that such lands were not of known mineral character.²⁵ Others merely provided a period within which challenges to the western states' title to school lands in place must be asserted.²⁶

²⁵ See S. 6507, 62d Cong., 1st Sess. (1912); S. 2911, 63d Cong., 1st Sess. (1913); S. 3305, 66th Cong., 1st Sess. (1919).

²⁶ See S. 1721, 67th Cong., 1st Sess. (1921); S. 2317, 67th Cong., 1st Sess. (1921); S. 2318, 67th Cong., 1st Sess. (1921); H.R. 6158, 67th Cong., 1st Sess. (1921); H.R. 6260, 67th Cong., 1st Sess. (1921); S. 1527, 68th Cong., 1st Sess. (1923); H.R. 5210, 68th Cong., 1st Sess. (1924); S. 3982, 69th Cong., 1st Sess. (1926).

Still others purported to issue patents to the state or to a state's grantee for the surface rights of school lands, whether mineral or not, while reserving to the United States all title to the minerals contained in the lands.²⁷ Under any of these three types of bills, known mineral lands (or mineral deposits) would continue to be withheld from the state. And each underscored the uncertainty of the states' title to school lands in place by making the effect of the prior federal grant of school lands contingent upon the passing of a specified period of time or upon the states' acquisition of patents. *See Joint Hearings, supra*, at 18 (testimony of Representative Colton).

The fourth class of bills included S. 564 in the 69th Congress—the bill that eventually became the Jones Act.²⁸ It provided forthrightly for relinquishment by the United States of all right and title to any numbered sections of land granted to the states for the support of public schools, regardless whether those lands were mineral in character. In so doing, S. 564 would "immediately terminate the 'vexatious and costly litigation'" to which the states were subjected—a result not achieved by the other classes of bills. *S. Rep. No. 603, supra* at 1-2. Importantly, these bills would also effect a change in federal-state relations, transferring from the federal government to the states control over a vast store of wealth.²⁹

²⁷ See S. 889, 67th Cong., 1st Sess. (1921); S. 671, 68th Cong., 1st Sess. (1923); S. 3412, 68th Cong., 1st Sess. (1924); S. 2585, 69th Cong., 1st Sess. (1926); S. 3078, 69th Cong., 1st Sess. (1926); H.R. 7910, 69th Cong., 1st Sess. (1926); H.R. 9182, 69th Cong., 1st Sess. (1926).

²⁸ 69th Cong., 1st Sess. (1925).

²⁹ See *Title to Lands Granted by the United States In Aid of Schools: Hearings on S. 564 Before the House Comm. on Rules*, 69th Cong., 2d Sess. 11 (1926) (hereinafter cited as "*Hearings on S. 564*") (remarks of Rep. Colton, acknowledging that S. 564 would take from the federal government control over mineral resources and place it in the states).

As reported out of the Senate Committee on Public Lands and Surveys, the Jones bill contained no restrictions on the rights of the grantee states to sell or lease the relinquished mineral lands, nor did the proposed legislation direct the states to devote the proceeds from such sales or leases to particular uses. The members of the Senate committee expressed confidence that the states would manage these lands prudently and thereby benefit their public schools. *S. Rep. No. 603, supra*, at 7. The Senate committee's report stated that, by granting without qualification these mineral lands to the western states, the bill would "tend to put them on a somewhat equal basis with the original states," all of which had "secured outright, without reservation, the lands within their borders." *Id.* at 6.³⁰

In the House, however, the Jones bill faced opposition from members who feared that it "might go too far against the principle of conservation" because it would have permitted the states to sell the valuable mineral deposits to private interests. *Hearings on S. 564, supra*, at 6. To allay these fears, the House committee amended the bill by requiring states to reserve mineral rights to themselves. To ensure that the states could obtain needed revenues from these minerals however, the Committee specified that "[t]he coal and other mineral deposits . . . shall be subject to lease by the State . . . as the State . . . legislature may direct," provided that the proceeds be used for the support of public schools. *See H.R. Rep. No. 1617, 69th Cong., 2d Sess. 1 (1926)*.

The House recognized, as the Senate had, that the states should be treated as "sovereigns rather than subjects," and that they could be relied upon to manage the newly granted lands in a manner that would conserve mineral resources, encourage investment in state-owned

³⁰ It was not until 1875, in the Enabling Act of Colorado, ch. 139, § 14, 18 Stat. 474, that Congress sought to control by restriction the manner in which the states could dispose of federally granted school lands. *See Hibbard, A History of the Public Land Policies* 317 (1939).

lands, and enhance the quality of their public schools. *Id.* at 14-15. Representative Sinnott explained the reasons for the amendments and their effects:

"We have inserted in the House bill, measures along conservation lines. We provide that the State cannot make an absolute grant of the minerals, after the passage of this Act. *The only way a State can dispose of the minerals is through the leasing system, proposed and passed by the State legislatures.* We feel that in these days the State legislatures can be depended upon to be just as zealous and just as jealous of the public school fund as the Federal Government can be. We believe that we will get safe and prudent laws enacted by our legislature, guarding these oils and these minerals."³¹

This discussion of leasing in the legislative history of the Jones Act makes clear that Congress intended to give the state legislatures absolute control over leasing, with confidence that the actions taken by the states would be "safe and prudent." Nowhere in the legislative history are there any references to appraisal or public auction restrictions of the type found in Arizona's enabling act. Congress decided that it was up to the state legislatures, not the federal government, to enact legislation "as a complete safeguard" against any repetition of past improvidence. 68 Cong. Rec. 1820 (1927) (remarks of Rep. Morrow).

2. Congress Recognized That Dispositional Restrictions of the Kind the Enabling Act Applied to Nonmineral Lands Could Not Practicably Be Applied to Mineral Lands.

The Jones Act's grant of mineral lands to the western states differed in kind from previous land grants, and although the particular problems of leasing mineral lands were not discussed at length, the legislative history shows that Congress understood that dispositional restrictions such as a prior appraisal requirement would have been impracticable if applied to mineral leases.

³¹ Hearings on S. 564, *supra*, at 6 (emphasis added).

In hearings on various bills introduced in the 69th Congress to deal with problems associated with the reservation of mineral lands from the grants of school lands to the western states (including the Jones bill) mention was made of a bill that had been introduced by Senator Smoot in the 67th Congress. That bill would have conferred rights on any good faith purchaser of state school lands that were later determined to have been reserved because of their mineral character. Pursuant to this bill, these purchasers would obtain "a confirmatory patent from the United States with the reservation of the mineral deposits in the land to the United States . . . upon payment of \$1.25 per acre, or to a patent without such reservation . . . upon payment of the appraised price of the land, as such purchaser may elect." S. 889, 67th Cong., 1st Sess. (1921). The bill was amended in committee, at the suggestion of Secretary of the Interior Fall, to exclude metalliferous deposits from the appraisal requirement, and the amended bill passed the Senate without objection. Secretary Fall explained that such an amendment was necessary because "*it would be practically impossible to appraise the lands containing metalliferous deposits the extent or value of which can not be known until they are mined and removed.*"³²

Similarly, in the Senate committee's report accompanying the bill that became the Jones Act, the committee noted that the mineral character of land is often unknown or purely speculative until "extensive and expensive exploration work has been carried on" or until "science has developed a new process making valuable a deposit which theretofore had no value." S. Rep. No. 603, *supra*, at 5. Congress well understood that the distinctive nature of mineral deposits, and the difficulty of appraising their value before they are leased necessitated

³² Letter of July 20, 1921, from Secretary of the Interior Fall to Senator Smoot, Chairman of the Senate Committee on Public Lands and Surveys, reprinted in *Joint Hearings*, *supra*, at 119 (emphasis added).

a kind of leasing regime different from that applied to agricultural, timber, or grazing lands.

3. Congress Did Not Intend to Incorporate the Restrictions of the Several States' Enabling Acts in the Jones Act Grant of Mineral Lands.

The Arizona Supreme Court erred in believing that Congress intended the language, "the grant of numbered mineral sections under this act shall be of the same effect as prior grants," to refer to anything more than the particulars of the conveyance, such as the effective date of the grant, the manner in which lieu selections were to be made, and so on. The legislative history confirms that that language was not intended broadly to embrace the restrictive provisions of the enabling acts of the various western states.

The "same effect" language was added to S. 564 only after Congress had considered what restrictions should be placed on the states. The only express restrictions Congress intended to impose were contained in the first amended version of S. 564 that was reported out of the House Committee on the Public Lands. That version of the bill did not contain the "same effect" language or anything like it.

The "same effect" language—indeed, the entirety of subsection (a) of the Jones Act—was drafted by Secretary of the Interior Work and was included in a substitute bill he presented to the House Committee on the Public Lands. The revisions in this substitute bill were merely intended to clear up any ambiguities in the language of the previous House bill and to exclude from the additional grant all lands in what was then the Territory of Alaska. Otherwise it did not differ substantively from the prior version.³³

³³ See Hearings on S. 564, *supra*, at 29-31 (testimony of Hubert Work); H.R. Rep. No. 1761, 69th Cong., 2d Sess. 2 (1927); 68 Cong. Rec. 2581 (1927) (remarks of Senator Winter).

In a letter accompanying his substitute bill, Secretary Work did not refer to any extant restrictions on the states' ability to dispose of nonmineral school lands, nor is there the slightest indication that the language he chose in subsection (a) was intended to incorporate those restrictions. Instead, Secretary Work explained the purpose of that subsection as follows:

"Under the bill title to numbered school sections containing minerals passes and vests in the same manner as under the prior grants for the numbered nonmineral sections, subject to the rights of adverse parties recognized by law. The last clause is for the purpose of protecting, as do the grants heretofore made, those citizens who make homestead settlement, mineral location, or initiate other claims permitted by law upon the lands prior to their identification by survey."³⁴

The "same effect" language, as Secretary Work explained, accomplishes nothing more than to clarify that the lands granted under the Jones Act "pass[] and vest[] in the same manner" as prior grants of numbered school sections. The legislative history of the Jones Act thus confirms that the entirety of subsection (a) of the act was intended to refer to the mechanics of the grant and the vesting of title; in this respect only would the additional grant made in the Jones Act be "of the same effect" as the prior grants in each of the western states' enabling acts.

Finally, if Congress had wanted to exercise federal control over the states' leasing of mineral lands when it passed the Jones Act in 1927, it certainly would have treated the states uniformly and imposed the same rules on all of them. The imprudent practices of earlier states and territories, which had squandered valuable school assets, are what prompted Congress to impose the especially stringent dispositional restrictions on Arizona and New

³⁴ H.R. Rep. No. 1761, *supra*, at 2.

Mexico in 1910.³⁵ See *Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947). There is no reason why Congress in 1927 would have intended to permit those earlier, errant states to have greater freedoms than Arizona and New Mexico could enjoy. Moreover, at the time of the Jones Act, Congress was preparing a joint resolution that would expressly free New Mexico from any dispositional requirements in the Enabling Act with respect to that state's leasing of state school lands for mineral purposes. (See p. 25, above.) It is inconceivable that Congress intended to single out Arizona of all the beneficiaries of the Jones Act.

C. Federal Laws Historically Have Not Required Appraisal Before Minerals Are Offered for Lease.

Congress' intent not to require a prior appraisal of mineral deposits when it granted lands to Arizona in 1910 and 1927 is confirmed by contemporaneous federal laws governing mineral development on public lands. These federal laws do not require mineral deposits to be appraised at true value before being offered for development by private interests. The 1910 and 1927 grants must be appreciated in "the environment out of which" they came, *Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employes*, 107 S. Ct. 1841, 1850 (1987), including their "contemporary legal context,"

³⁵ The restrictions placed upon the various western states differed considerably, but of the states affected by the Jones Act, only New Mexico and Arizona were required to appraise school lands before disposing of them. Some acts required that any sale of school lands be done by public sale. See Enabling Act of Wyoming, ch. 664, § 5, 26 Stat. 222, 223 (1890); Enabling Act of Idaho, ch. 656, § 5, 26 Stat. 215, 216 (1890); Enabling Act of North Dakota, South Dakota, Montana, and Washington, ch. 180, § 11, 25 Stat. 676, 679, 680 (1889) (also requiring price of not less than \$10 per acre); Enabling Act of Colorado, ch. 139, § 14, 18 Stat. 474, 476 (1875) (also requiring price of not less than \$2.50 per acre). Utah's Enabling Act did not contain either an appraisal or a public sale requirement. Ch. 138, § 8, 28 Stat. 107, 110 (1894).

Mountain States Telephone & Telegraph v. Pueblo of Santa Ana, 472 U.S. 237, 252 (1985) (citation omitted).³⁶

At the time of the grants to Arizona, it was the practice of Congress to deal with minerals "along different lines . . . under laws specially including them."³⁷ The federal laws dealing specifically with minerals have always recognized that mineral exploration, development and extraction is an integrated process. Accordingly, those laws confer upon the discoverer of deposits preferred or vested rights to extract the minerals.³⁸ Federal laws do not require mineral ores to be appraised before being offered for leaseholds or patents.

The federal mining laws of 1872, which governed all valuable minerals except coal when the 1910 Enabling Act was passed, embrace the location method of staking claims.³⁹ A locator obtains an exclusive right of possession against others in a discovered deposit and then, upon payment of a set fee per acre, receives a patent to the land from the federal government. 30 U.S.C. §§ 21-54. The federal location law has never contained anything like an appraisal requirement. On its face the federal mining laws of 1872 continue to apply to all "valuable mineral deposits," *id.* § 22, but since the passage of the Mineral Leasing Act of 1920 and other legislation, the 1872 act now chiefly governs metalliferous ores such as the copper and silver prevalent in Arizona.⁴⁰

³⁶ See also *Leo Sheep Co. v. United States*, 440 U.S. at 669 ("courts in construing a statute, may with propriety recur to the history of the times when it was passed"); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 563 (1980).

³⁷ *United States v. Sweet*, 245 U.S. at 567.

³⁸ An exception is that the Mineral Leasing Act of 1920 requires public bidding for proven hydrocarbon fields. 30 U.S.C. § 226.

³⁹ Act of May 10, 1872, ch. 152, 17 Stat. 91.

⁴⁰ Approximately forty-four percent of the total acreage of Arizona is owned by the federal government and a substantial amount of that land is governed by the federal mining laws of 1872. Depart-

In 1920 Congress passed the Mineral Leasing Act, which applies to oil, gas, coal, oil shale, sodium, and phosphate. 41 Stat. 437, codified as amended at 30 U.S.C. §§ 181-287. For those principally hydrocarbon minerals, the federal act establishes leasing terms, grants preferred rights to prospectors and governs royalty rates and bonus payments for the extraction of specified minerals. The Mineral Leasing Act of 1920 does not require a prior appraisal to determine the true value of mineral deposits before offering them for lease.

The reason for this "different treatment" of minerals in federal laws relates to the practicalities of mineral development. It is extremely difficult and costly to appraise mineral deposits, and an appraisal of true value usually cannot be made at any cost before the lands are offered to a private prospector or locator for development. When a fair market value must be put on a condemned mining area to satisfy the requirement of just compensation under the Fifth Amendment, this Court and others have commented frequently on the difficulties of appraising mineral lands, even those that have been explored and developed and are known to contain ore reserves.⁴¹ The contemporaneous federal practice on mineral extraction confirms that Congress, recognizing the impracticality of appraising mineral deposits, did not intend to impose on Arizona the appraisal and related dispositional requirements in the Enabling Act when it granted mineral lands to the state.

ment of the Interior, Bureau of Land Management, *Public Land Statistics*, Vol. 172, Tables 4, 5 (1987).

⁴¹ See, e.g., *Montana Ry. v. Warren*, 137 U.S. 348, 352 (1890); *United States v. 103.38 Acres of Land, More or Less*, 660 F.2d 208, 210, 213 (6th Cir. 1981); *United States v. 2,847.58 Acres of Land, More or Less*, 529 F.2d 682, 684-87 (6th Cir. 1976). See also 1 Rocky Mountain Mineral Law Foundation, *American Law of Mining* § 11.11 (2d ed. 1988) ("the existence of known mineral values in either the offered or selected lands introduces an extremely difficult factor into the appraisal process").

D. The Amendments to the Enabling Act of 1910 Were Intended to Confirm the Broad Authority to Lease Mineral Lands Granted Arizona in the Jones Act.

The history of subsequent amendments to the Enabling Act of 1910 confirms that Congress clearly intended to permit the Arizona Legislature to lease mineral lands without following the procedures imposed by that act on the state's disposition of nonmineral lands and surface assets.

1. By the 1936 Amendment Congress Undertook to Deal With the Leasing of Later-Discovered Mineral Deposits Consonantly With the Way the Jones Act Had Dealt With the Leasing of Known Mineral Deposits.

In 1936, Congress recognized that, although the Jones Act granted mineral lands to Arizona and delegated broad authority to the state legislature to determine the means and manner by which those lands are leased, title to school sections containing minerals may have vested in the state under the grant made by the Enabling Act because their mineral character was not discovered until after the grant became effective. See S. Rep. No. 1939, 74th Cong., 2d Sess. 2 (1936); *Wyoming v. United States*, 255 U.S. 489 (1921). Because Congress did not in the Enabling Act intend to convey any mineral lands, however, "[t]here [was] no provision in [that legislation] for the development or protection of minerals on such lands." S. Rep. No. 1939, *supra*, at 2 (1936) (emphasis added). Nor did the provisions of the Jones Act apply to these later-discovered mineral lands, and the states thus "ha[d] the right to dispose of such lands including their mineral contents." *Id.* Congress filled the gap in the coverage of the Enabling Act when it amended Section 28 in 1936.

Congress amended the Enabling Act of 1910 by striking from the proviso in the third paragraph of Section 28 the words "nothing herein contained shall prevent said proposed States from leasing any of said lands referred to in this section for a term of five years or less without

said advertisement herein required." This language was replaced by a provision stating that the state could lease lands for specific purposes, including mineral development, for longer terms in such a manner as the state legislature should direct:

"Provided, That nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands referred to in this section for grazing and agricultural purposes for a term of ten years or less, or from leasing any of said lands for mineral purposes (including leases for exploration of oil and gas and extraction thereof) for a term of twenty years or less"⁴²

Both the House and the Senate committees concluded that the purpose of the amendment was "to remove certain restrictions contained in the Enabling Act and to liberalize the provisions of said act with respect to the disposition and leasing of lands granted by said act to the State of Arizona." S. Rep. No. 1939, *supra*, at 2 (letter from Secretary of the Interior West) (emphasis added); H.R. Rep. No. 2615, 74th Cong., 2d Sess. 2 (1936) (same).⁴³ This "liberalization" was deemed appropriate because "[t]he experience the State has now had in managing its lands would seem to warrant removing the restrictions placed on its grant to the extent proposed by [the amendment]." S. Rep. No. 1939, *supra*, at 3; H.R. Rep No. 2615, *supra*, at 3.

The experience of Arizona in leasing mineral lands to which the committee reports approvingly referred was then, as it had always been, to grant preferred rights

⁴² 49 Stat. 1477, 1478 (1936) (p. 10a, below). The act further amended the Enabling Act by striking from the fifth paragraph of Section 28 the minimum fixed price (\$3.00/acre) for the sale of lands, and also made provision by which the state could exchange state-owned lands for other lands, whether public or private.

⁴³ By referring only to the lands conveyed by the Enabling Act, the committees made clear that the amendments did not affect the Jones Act provisions governing the state's leasing of mineral lands.

to locators and prospectors of mineral deposits without requiring a prior appraisal of the areas before they are offered and without leasing at an appraised value. (Pp. 24-25, above.) The 1936 amendments endorsed this practice and harmonized the terms of the Enabling Act with the liberal leasing regime established by the Jones Act. S. Rep. No. 1939, *supra*, at 2-3; H.R. Rep. No. 2615, *supra*, at 2-3.

In 1941, shortly after the passage of these amendments, Arizona enacted the royalty statute that has governed mineral leasing in the state for almost fifty years and which, like its predecessor, requires neither an appraisal of each mineral area before it is offered nor leasing at an appraised value.

2. The 1951 Amendment Was Not Intended to Alter the Regime Established by the Jones Act and the 1936 Amendment for the Leasing of Nonhydrocarbon Minerals.

In 1951, Congress again amended Section 28 of the Enabling Act. 65 Stat. 51 (p. 4a, below). While the amendment clarified the authority of the state to lease for mineral development lands also leased for grazing and agricultural purposes, its principal purpose was to establish a new regime for the leasing of hydrocarbons (chiefly oil and gas) that was not applicable to other types of minerals. The amendment permitted leasing "for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe" and mandated a production royalty on hydrocarbon leases of not less than twelve and one-half percent.

The Senate and House committee reports, which are virtually identical, state that the purpose of the amendment was "to enable Arizona to develop her public

lands, particularly with respect to production of oil and gas, for the benefit of her schools and for other public purposes." S. Rep. No. 194, 82d Cong., 1st Sess. 1 (1951); H.R. Rep. No. 429, 82d Cong., 1st Sess. 1 (1951). The reports identified two restrictions that seemed particularly "harmful": (1) "the lack of provision for oil and gas leases for an initial term and as long thereafter as oil and gas are produced"; and (2) "a 10-week detailed advertisement which must appear in two newspapers in different localities." H.R. Rep. No. 429, *supra*, at 2; *see also* S. Rep. No. 194, *supra*, at 1-2.

The 82d Congress may have been under the impression that the Enabling Act of 1910, as amended in 1936, imposed some leasing restrictions—at least advertising—on the state with respect to the leasing for mineral purposes of the lands granted therein. The language and legislative history of the 1910 act and the 1936 amendment, however, make clear that requirements such as advertising had not in fact been imposed on the state's authority to lease lands for mineral purposes for twenty years or less. Despite this confusion in the legislative history of the 1951 amendments, the overall intent of the 82d Congress is clear. The Senate Report states:

"The committee wholeheartedly concurs with the Secretary of the Interior in believing that—

the Legislature of the State of Arizona could best determine what procedures would be most fruitful in producing income from and obtaining the maximum utilization of the granted lands." ⁴⁴

Congress again intended to free the state from burdensome leasing procedures.

The intent to "liberalize" is also manifest in the amendments made by the Senate Committee on Interior and Insular Affairs. The original bill would have

changed the proviso in the third paragraph of Section 28 in part to read: "Nothing herein contained shall prevent . . . the leasing of any of said lands, in such a manner as the Legislature of the State of Arizona may prescribe . . . for mineral purposes [except for hydrocarbon leasing] for a term of twenty years or less, *without advertising*." S. Rep. No. 194, *supra*, at 5 (emphasis added). The Committee "deemed it advisable to eliminate the words 'without advertising'" in order to "place[] [Arizona] on an equal footing with the greater number of her sister States in respect to the type of leases for which provision is made." *Id.* at 2. These sister states "ha[d] been able progressively to liberalize the terms of leases of their State lands, thus placing Arizona at comparative disadvantage." *Id.* The report noted that states like New Mexico (by virtue of the 1928 joint resolution), Wyoming, North Dakota, South Dakota, Montana, and Washington were able to lease school lands for mineral purposes "without restriction" as to manner and conditions. *Id.* at 2-3.

The same Senate committee report also makes clear that Congress was aware that leases for up to ten years of agricultural and grazing lands were exempt "from the restrictions contained in the original Enabling Act." *Id.* at 2. That exemption must have been in the "nothing herein contained" proviso of Section 28 of the Enabling Act; there is no other possible statutory source of the exemption. One of the effects of the 1951 amendments, according to the Senate report, was to extend the original exemption to include leases for commercial and home site purposes. *Id.* If, as Congress recognized in 1951, the proviso in Section 28 exempts agricultural and grazing leases from the restrictions of the Enabling Act, then it necessarily follows that mineral leases, contrary to the assumption of the court below, are similarly exempt, because they are covered by the same "nothing herein contained" proviso.

Taken as a whole, the legislative history of the 1951 amendments to the Enabling Act establishes that Con-

⁴⁴ S. Rep. No. 194, *supra*, at 2.

gress intended further liberalization of the state's authority to make hydrocarbon leases and no change in the state's authority over nonhydrocarbon leasing other than to authorize leasing on grazing and agricultural lands.

E. The Decision in *Alamo Land and Cattle Co.* Does Not Interpret the Jones Act or Otherwise Govern the Leasing of Minerals.

The court below was mistaken in believing that this case is controlled by the Court's decision in *Alamo Land and Cattle Co. v. Arizona*, 424 U.S. 295 (1976). The issue in *Alamo* was whether a grazing lessee of state school lands has a compensable interest in such lands upon condemnation. This Court held that a lessee could have such an interest and remanded for a determination whether the lessee in that case had a valid lease from the state and if so how that lease should be evaluated. The Court's holding in *Alamo* decided only that the lessee could share condemnation proceeds with the state. In so ruling, the Court stated that a lessee is not entitled to receive compensation upon condemnation of state lands when he holds a lease at less than its "true value," 424 U.S. at 311, but that conclusion concerns a different question from the question whether the state legislature had the power as an initial matter to issue the grazing lease without prior appraisal of the area. The dissenting opinion in *Alamo* makes clear that condemnation of state school lands involves considerations quite apart from the validity of a lease. 424 U.S. at 311.

Moreover, mineral leasing was not at issue in *Alamo*. The Court had no occasion to consider the Jones Act of 1927, which is the source of the mineral leasing authority expressly granted to Arizona and other western states. Nor did it consider whether the appraisal requirement in the Enabling Act of 1910 has any application to mineral lands that were expressly excluded from that initial grant.

The Court in *Alamo*, was not asked to, and did not, consider whether the 1936 and 1951 amendments to Sec-

tion 28 extended the exemption from the dispositional restrictions that the original Enabling Act provided for leases of five years or less. That such was the purport of the amendments is even clearer in the case of mineral leases because of the Jones Act, which unequivocally states the will of Congress with respect to such leases while saying nothing about grazing leases.

Because the issue decided in *Alamo* was not the authority of the state legislature to lease mineral deposits, a matter that has been the subject of explicit congressional action, and because the effect of the amendments to the Enabling Act was not considered in that case, *Alamo* does not resolve the question presented here.

III. RESPONDENTS' REAL COMPLAINT—THAT ARIZONA HAS CHOSEN A FIXED ROYALTY METHOD OF LEASING MINERAL LANDS RATHER THAN SOME OTHER METHOD THAT THEY ALLEGE MIGHT RAISE MORE REVENUE—RAISES AN ISSUE OF POLICY THAT HAS BEEN RESOLVED BY THE ARIZONA LEGISLATURE PURSUANT TO AUTHORITY GRANTED BY CONGRESS.

The impracticability of applying a prior appraisal requirement to mineral leases has long been recognized. No one in this litigation or outside of it can refute the Secretary of the Interior's statement (p. 31, above) that "it would be practically impossible to appraise the lands containing metalliferous deposits the extent or value of which cannot be known until they are mined and removed." What the Secretary said back in 1921 was true then and remains true today; the soundness of his observation is confirmed by the mineral leasing practices of the federal government and by federal laws governing the other western states, which do not attempt to prescribe the "practically impossible." (See pp. 34-36 & n.35, above.)

Respondents' real complaint must therefore be that Arizona takes a uniform royalty of five percent on the minehead value of minerals extracted pursuant to state leases. They think that a uniform royalty yields less

money to support the public schools than would some other leasing regime, such as negotiated royalty rates or, perhaps, simply a higher uniform rate. Arizona cannot claim unanimity of the jurisdictions for its particular royalty regime, though it is by no means unique (*see p. 8, n.13, above*), but it can claim a reasoned legislative judgment that a uniform five percent royalty rate best serves Arizona's public schools by encouraging the location and exploitation of mineral deposits, without which any mineral leasing system is words on paper yielding no revenues. Justice Cameron, dissenting below, pointed out that on the record in this case California's high minimum royalty rate was self-defeating—"one of the primary reasons for the lack of metallic mineral production" from that state's public lands. (Pet. 35a.)

Respondents' assertion may ultimately be that, without regard to the specific but inherently inapposite statutory restrictions that they and the majority below strain to apply to mineral leases, Arizona is in breach of some general trust principles that they say apply to the state's management of the school lands. If so, then Justice Cameron gave the complete answer in his dissent. He assumed that the state took its mineral lands in trust, though the Jones Act does not say so and this Court has recognized that not all school lands are held in trust,⁴⁵ and he then said:

"In reviewing the testimony in the trial court, I believe there is sufficient evidence from which it can be found that a royalty of five percent returns an equal if not a greater amount to the school trust account than could be obtained through other methods of leasing. The legislature, in establishing a royalty rate, may balance the revenues to be received with the discouragement of future mining operations that might occur with the imposition of higher royalty rates." (Pet. 34a.)

This is not to say that the balance struck by the Arizona Legislature is the only permissible balance. Re-

spondents are free to attempt to persuade their representatives in the legislature that another mineral leasing regime would indeed yield more revenues. But in striking the balance it has the legislature clearly acted within the bounds of the discretion that Congress accorded it and with fidelity to whatever fiduciary obligation it has. Respondents cannot properly ask this Court to dictate an end to Arizona's present mineral leasing regime because neither federal statutes nor, if they are relevant, general trust principles condemn the system that Arizona has used for nearly fifty years. In adopting that system in 1941, the Arizona Legislature was able to harmonize the not entirely congruous provisions of the Jones Act and the amended Enabling Act. It limited nonhydrocarbon mineral leases to twenty years as the amendments to the Enabling Act require for after-discovered mineral deposits though the Jones Act provides no such temporal limitation on leases of known mineral deposits. The Arizona statute also forbids the sale of all mineral lands owned by the state, including those that passed under the Enabling Act, even though the Jones Act's prohibition against sale applies only to known mineral lands.⁴⁶

For many years mining companies and individual prospectors, including petitioners, have invested heavily in mineral exploration and development in Arizona confident that the state mining laws would assure them enjoyment of any discovered deposits at a predictable royalty rate. Extension of Section 28's appraisal requirements well beyond their intended scope would have a profoundly adverse effect on these individual investors and mining companies and would upset decades of private activities built in good-faith reliance on the state's long-standing posture on mineral leasing. This reliance constitutes a further reason why the state statute should stand. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 458 (1978); *Udall v. Tallman*, 380 U.S. 1, 17-18 (1965). Moreover, this Court traditionally has recog-

⁴⁵ See *Papasan v. Allain*, 478 U.S. at 289-91 n.18.

⁴⁶ See Ariz. Rev. Stat. Ann. §§ 27-235(A), 37-231(D), (E).

nized the importance of "certainty and predictability" in land tenure systems and has been especially sensitive to settled expectations in this area.⁴⁷ Arizona's mineral leasing practice should be sustained.

CONCLUSION

For the reasons stated, the decision of the Supreme Court of Arizona should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

⁴⁷ Louisiana v. Garfield, 211 U.S. 70, 76 (1908); Iron Silver Mining Co. v. Elgin Mining & Smelting Co., 118 U.S. 196, 207 (1886); Lessees of Irwin H. Doolittle's Lessee v. Bryan, 55 U.S. (14 How.) 563, 566 (1853).

STATUTORY APPENDIX

The Jones Act of 1927, as amended, ch. 57, Pub. L. No. 570, 44 Stat. 1026; ch. 151, Pub. L. No. 110, 47 Stat. 140 (1932); ch. 169, Pub. L. No. 340, 68 Stat. 57 (1954); ch. 572, Pub. L. No. 699, 70 Stat. 529 (1956); codified as amended at 43 U.S.C. §§ 870-71.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of subsections (a), (b), and (c) of this section, the several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character, unless land has been granted to and/or selected by and certified or approved, to any such State or States as indemnity or in lieu of any land so granted by numbered sections.

(a) That the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

(b) That the additional grant made by this Act is upon the express condition that all sales, grants, deeds, or patents for any of the lands so granted shall hereafter be subject to and contain a reservation to the State of all the coal and other minerals in the lands so sold, granted, deeded, or patented, together with the right to prospect for, mine, and remove the same. The coal and other mineral deposits in such lands not heretofore disposed of by the State shall be subject to lease by the State as the State legislature may direct, the proceeds and rentals and royalties therefrom to be utilized for the support or in aid of the common or public schools: *Provided*, That any lands or minerals hereafter disposed of contrary to

the provisions of this Act shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in the United States district court for the district in which the property or some part thereof is located.

(c) Except as provided in subsection (d), any lands included within the limits of existing reservations of or by the United States, or specifically reserved for water-power purposes, or included in any pending suit or proceeding in the courts of the United States, or subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, and all lands in the Territory of Alaska, are excluded from the provisions of this Act.

(d) (1) Notwithstanding subsection (c), the fact that there is outstanding on any numbered school section, whether or not mineral in character, at the time of its survey a mineral lease or leases entered into by the United States, or an application therefor, shall not prevent the grant of such numbered school section to the State concerned as provided by this Act.

(2) Any such numbered school section which has been surveyed prior to the date of approval of this amendment, and which has not been granted to the State concerned solely by reason of the fact that there was outstanding on it at the time of the survey a mineral lease or leases entered into by the United States, or an application therefor, is hereby granted by the United States to such State under this section as if it had not been so leased; and the State shall succeed the position of the United States as lessor under such lease or leases.

(3) Any such numbered school section which is surveyed on or after the date of approval of this amendment and on which there is outstanding at the time of such survey a mineral lease or leases entered into by the

United States, shall (unless excluded from the provisions of this section by subsection (c) for a reason other than the existence of an outstanding lease) be granted to the State concerned immediately upon completion of such survey; and the State shall succeed to the position of the United States as lessor under such lease or leases.

(4) The Secretary of the Interior shall, upon application by a State, issue patents to the State for the lands granted by this Act, in accordance with the Act of June 12, 1934 (48 Stat. 1185, 43 U.S.C. 871a). Such patent shall, if the lease is then outstanding, include a statement that the State succeeded to the position of the United States as lessor at the time the title vested in the State.

(5) Where at the time rents, royalties, and bonuses accrue the lands or deposits covered by a single lease are owned in part by the State and in part by the United States, the rents, royalties, and bonuses shall be allocated between them in proportion to the acreage in said lease owned by each.

(6) As used in this subsection, "lease" includes "permit" and "lessor" includes "grantor."

SEC. 2. That nothing herein contained is intended or shall be held or construed to increase, diminish, or affect the rights of States under grants other than for the support of common or public schools by numbered school sections in place, and this Act shall not apply to indemnity or lieu selections or exchanges or the right hereafter to select indemnity for numbered school sections in place lost to the State under the provisions of this or other Acts, and all existing laws governing such grants and indemnity or lieu selections and exchanges are hereby continued in full force and effect.

New Mexico-Arizona Enabling Act of 1910, ch. 310, Pub. L. No. 219, § 24, 36 Stat. 557, 572.

That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections

two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to pre-emption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes, and Acts amendatory thereof or supplementary thereto, are hereby made applicable thereto and to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein

New Mexico-Arizona Enabling Act of 1910, as amended, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574-75; ch. 517, Pub. L. No. 658, 49 Stat. 1477 (1936); ch. 120, Pub. L. No. 44, 65 Stat. 51 (1951).

That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in

any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and home-site purposes, for a term of ten years or less; (2) the leasing of any of the said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas, and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured

therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than their appraised value, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

The State of Arizona is authorized to exchange any lands owned by it for other lands, public or private,

under such regulations as the legislature thereof may prescribe: *Provided*, That such exchanges involving public lands may be made only as authorized by Acts of Congress and regulations thereunder.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds

conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act.

New Mexico-Arizona Enabling Act of 1910, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574, third and fourth paragraphs.

* * * *

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of

like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

* * * *

New Mexico-Arizona Enabling Act of 1910, as amended by the Act of June 5, 1936, ch. 310, Pub. L. No. 219, § 28, 36 Stat. 557, 574, ch. 517, Pub. L. No. 658, 49 Stat. 1477, third and fourth paragraphs.

* * * *

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portions thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of

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ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered, nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said State of Arizona from leasing in a manner as the State legislature may direct, any of said lands referred to in this section for grazing and agricultural purposes for a term of ten years or less, or from leasing any of said lands for mineral purposes (including leases for exploration of oil and gas and extraction thereof) for a term of twenty years or less.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

* * * *

Ariz. Rev. Stat. Ann. § 27-234(B) (1976 and Supp. 1987).

Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the

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actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

(1) No. 87-1661

Supreme Court, U.S.

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In The
Supreme Court of the United States

October Term, 1988

ASARCO, INCORPORATED, et al.,
Petitioners,

v.

FRANK AND LORAIN KADISH, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court
Of the State of Arizona

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

The Arizona Enabling Act and Constitution establish an express trust over Arizona's federally granted school lands and their products, and further specifically prohibit the leasing of such lands for less than their true value as established by appraisal. Only oil and gas leases are excepted from the prior appraisal requirement: Mineral leases, specifically authorized in the Act and Constitution, are not so excepted. Despite these provisions, the State of Arizona has for years leased school trust mineral lands under a statute that actually prohibits prior appraisal and imposes one inflexible royalty rate on the net value of all minerals extracted — a formula that in some cases mandates the outright giveaway of school trust mineral resources. The question presented is whether the Arizona Supreme Court correctly held this statute to be violative of the appraisal and true value requirements as well as the state's fiduciary duty to maximize revenues for the benefit of the public schools.

LISTINGS REQUIRED BY RULE 28.1

The listings for respondents required by Rule 28.1 of the rules of this Court are at page ii of Respondents' Brief in Opposition, filed on May 24, 1988.

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No. 87-1661

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**On Writ of Certiorari to the Supreme Court
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BRIEF FOR RESPONDENTS

STATEMENT

Introduction. The Arizona Enabling Act and Constitution establish an express trust over Arizona's granted school lands and their products and further specifically prohibit the leasing of such lands for less than their true value as established by appraisal. Only oil and gas leases are expressly excepted from the prior appraisal requirement: Mineral leases, specifically authorized in the Act, are not so excepted. Relying on these provisions, the Arizona Supreme Court struck down as violative of the Act and Constitution an Ari-

zona statute that sets a maximum price for all minerals sold from trust lands, that bars the state land commissioner from requiring payment of the appraised, true value for mineral leases, and that in some cases mandates the outright giveaway of trust mineral assets. Although Arizona no longer defends this statute, the petitioners (hereinafter "the mines") urge this Court to reverse the court below on the theory that minerals are totally exempt from the Act's trust restrictions. The Arizona Supreme Court considered and rejected this claim, finding that Congress intended Arizona's school children to enjoy the full benefit of these trust assets.

The School Land Grant in Arizona. Pursuant to the Enabling Act, the United States granted four sections of land in each township to Arizona, collectively totaling almost ten million acres.¹ The Act declared that "all lands" thereby granted, as well as all "natural products and money proceeds" of such lands "shall be by the said state held in trust" to be disposed of only in accordance with the Act's specific directives. The Act prohibited the disposal of any trust lands or products thereof for less than "true value" as established by prior appraisal, and required competitive bidding as publicized by prior advertisement. *Id.* The Act further provided that "[d]isposition of any said lands, or of any money or thing of value directly or indirectly derived therefrom" in any manner contrary to the provisions of the Act "shall be deemed a breach of trust." Act §28.²

These restrictions reflected "Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust." *Lassen v. Arizona*, 385 U.S. 458, 467 (1967).

¹ New Mexico-Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557 (hereinafter the "Act"). See Pet. 4a-5a.

² The original Enabling Act also contained a general prohibition on the mortgage or other encumbrance of the school trust lands. An exception was provided, however, for leases for a term of five years or less. Such leases were allowed without having to comply with the advertisement requirement that would otherwise be applicable. Act §28, 36 Stat. at 574.

Prior to Arizona's admission, a number of states had squandered and dissipated their school trust resources, sometimes by private sales at unreasonably low prices. *Id.* at 464; *Murphy v. State*, 65 Ariz. 338, 351, 181 P.2d 336, 344 (1947). Because of such past abuses, Congress was determined to ensure that Arizona's trust would not "be exploited for private advantage." *Lassen*, 385 U.S. at 464. Accordingly, the restrictions inserted into the Act on disposition of trust assets were much more stringent than those in earlier enabling acts. See *Id.* at 467-68.

The original Enabling Act excluded from the school land grants any sections known to be mineral in character at the time of survey.³ Despite this reservation, minerals were sometimes discovered after title vested in the state. As long as the presence of these "after discovered" minerals was not known at the time of survey, the land and the minerals were treated as having passed to the school trust along with the rest of the grant. See *Shaw v. Kellogg*, 170 U.S. 312, 332-33 (1898). However, the question of whether any particular section was "known" mineral at survey could always be contested: there was no statute of limitations, at least insofar as claims by the United States for recovery of such lands. Thus, the state's title to virtually every school section was subject to challenge at any time on the ground that it had in fact been known mineral in character at survey.

To remove this title cloud and effectuate the purpose of the original grants, Congress passed the Jones Act of 1927, described in its title as: "An Act Confirming in States and Territories title to lands granted by the United States in aid of common or public schools." By its terms, the Jones Act "extended" the grants to the states of numbered school sec-

³ The state's title to school sections did not vest until completion of an official survey, which sometimes did not occur until years after statehood. See, e.g., *Andrus v. Utah*, 446 U.S. 500, 502-03, 507 n.8 (1980). As used herein, the time of "survey" means the date of statehood as to sections already surveyed by then, and the date of actual survey as to other sections.

tions "to embrace numbered school sections mineral in character." This grant of mineral sections was to "be of the same effect as prior grants for the numbered non-mineral sections." As an additional protective measure, the statute prohibited the states from selling their mineral rights outright, allowing them only to be leased. As with the original grants, the proceeds from such leases were earmarked for the public schools. Jones Act of 1927, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. §870).

In 1936 Congress amended the Arizona Enabling Act to extend the permissible duration of school trust mineral leases beyond the five year limit in the original act. The amendment specifically authorized leases for "mineral purposes (including leases for exploration of oil and gas and extraction thereof)" for up to twenty years. In addition, the amendment deleted the Enabling Act's original exemption of these leases from the requirement of public advertisement. Act of June 5, 1936, ch. 517, 49 Stat. 1477.

The most recent amendment to the Arizona Enabling Act came in 1951. At that time, Congress specifically exempted oil and gas leases, which had previously been treated as a category of mineral leases, from the Act's appraisal, bidding and advertising requirements. No such exemption was provided for other kinds of mineral leases. Act of June 2, 1951, ch. 120, 65 Stat. 51. Although the original version of the amendment would have exempted other kinds of mineral leases from the advertisement requirement, even that exemption was deleted by the Senate committee. S. Rep. No. 194, 82d Cong., 1st Sess. 2, 5 (1951).

Operation and Effect of the Mineral Royalty Statute. As of 1983, a total of 145 lessees held 681 state-issued mineral leases on Arizona's school trust lands. R. 31.⁴ At least 28 different minerals are encompassed by these leases, including

⁴ 'R' references are to document item numbers in the Maricopa County Superior Court docket index. J.A.1. 'SR' references are to document item numbers in the Arizona Supreme Court docket index. J.A.13.

not only metalliferous materials such as copper, molybdenum, uranium, gold, and silver, but also nonmetalliferous materials such as clay, sandstone, gypsum, and marble. *Id.* Leaseholds are located throughout the state, and range from small gemstone claims worked by individuals to multimillion dollar open pit mines operated by major corporations. *Id.*

The Arizona State Land Commissioner is charged with the responsibility of managing all of the state's school trust lands. Ariz. Rev. Stat. Ann. §§37-101, -131. Under Arizona's first mineral leasing statute adopted in 1915, the Commissioner had authority to negotiate the terms of mineral sales on a case-by-case basis: There was no maximum royalty rate and the Commissioner was free to require payment of true value for each claim. 1915 Ariz. Sess. Laws 13, 27-28 (2d Sp. Sess.), codified in 1928 Rev. Code Ariz. §2973. In 1941, however, the state legislature adopted Arizona's current mineral royalty statute, setting a fixed formula that must be followed by the Commissioner in administering all trust mineral leases. Under this statute the royalty for extraction of minerals from school lands must in every case be 5% of the net value of minerals produced. Ariz. Rev. Stat. Ann. §27-234.B. The Commissioner must charge precisely the same rate for copper, gold, and uranium as he charges for clay, lead and sandstone, and he is precluded from appraising each leasehold to determine its true value prior to leasing. The fixed, 5% royalty payment constitutes the entire price paid by the lessee for the minerals, aside from a \$15 per lease annual rental payment. Ariz. Rev. Stat. Ann. §27-234.A.

The Commissioner must calculate the royalty as a percentage of the "net value" of the minerals, that is, the value after deduction of various costs of processing, transportation, and taxes. Where these costs exceed the gross mineral value, the "net value" — and consequently the royalty — is zero. Thus, as the court below found, under §27-234.B. "it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever." Pet. at 26a.

According to the Arizona Auditor General, Arizona is the only state with a fixed, non-negotiable royalty rate for mineral leases. Pet. at 25a. In other states, royalty rates are set through competitive bidding, administrative regulation, or case-by-case negotiation.⁵ Moreover, other states avoid the outright giveaway of trust minerals either by requiring minimum royalty payments or calculating royalties as a percentage of gross mineral value.⁶ The state Auditor General has also found Arizona's royalty rate to be one of the lowest in the nation. If Arizona's royalty rate were comparable to other lessor states, "revenues from mineral leases would have been as much as \$6.5 million more" in one year studied by the Auditor General. R 75, Exh. A.

The statutory rate is also substantially below rates charged on non-state mineral leases within Arizona itself. During the period 1973-1983, one of the petitioners in this case — ASARCO, Inc. — paid royalties to the Tohono O'Odham (formerly Papago) Indians ranging from 6% to 14% of net value for copper and molybdenum extracted from the San Xavier Reservation near Tucson. R.75, Exh. B. In no year was the royalty payment as low as 5%. During the same period, ASARCO paid the flat 5% royalty on nearly \$200 million worth (net value) of the same minerals extracted from state trust land immediately adjacent to its mine on the San Xavier Reservation. *Id.* Thus ASARCO has at times paid to the Tohono O'Odham nearly triple the roy-

alty rate that the Land Commissioner can charge under Ariz. Rev. Stat. Ann. §27-234.B.⁷

In at least one instance, the Arizona royalty statute has forced the Land Commissioner to dispose of trust minerals for no compensation whatsoever. In November 1983, ASARCO paid no royalties whatsoever for more than \$2.4 million worth of copper concentrates (gross value) produced from the state mineral lease referred to above. R.75, Exh. C. ASARCO's costs in that month exceeded the gross value of minerals produced by more than \$85,000, so the "net value" was zero. *Id.* The statute therefore did not permit assessment of any royalties for that month.

The Decision Below. In the court below, petitioners challenged the mineral royalty statute as a breach of the trust restrictions in both the Enabling Act and the Arizona Constitution.⁸ They maintained that the statute violated not only the specific requirements for appraisal and true value, but also the state's basic trust obligations to maximize revenues and prevent the dissipation of trust assets. The New Mexico State Land Commissioner, who administers school trust lands granted in the same Congressional act as Arizona's, filed a brief *amicus curiae* also urging invalidation of the statute, arguing that the setting of a maximum royalty rate violated basic trust principles and was inconsistent with longstanding New Mexico practice. SR 8.

In a 3 to 1 decision, the Arizona Supreme Court found that the royalty statute violated both the Enabling Act and the Arizona Constitution because it circumvented the appraisal and true value requirements, because it limited

⁵ See, e.g., Cal. Pub. Res. Code §§6895, 6897 (West Supp. 1987); N.M. Stat. Ann. §§19-8-14, -22, -33 (Supp. 1985); Okla. Stat. Ann. tit. 64, §§454, 455, 458 (West 1964); S.D. Codified Laws Ann. §§5-7-11.1, -12 (1985); Tex. Nat. Res. Code Ann. §§32.1071, -.1073 (Vernon Supp. 1988); Wyo. Stat. §36-6-101 (Supp. 1987).

⁶ See, e.g., Pet. at 26a; Cal. Pub. Res. Code §6895 (West Supp. 1987); Tex. Nat. Res. Code Ann. §32.1073 (Vernon Supp. 1988); Utah Code Ann. §65-1-18.

⁷ A number of federal statutes and regulations also provide higher royalty rates. See, e.g., 30 U.S.C. §207 (minimum 12.5% royalty for surface-mined coal); 25 C.F.R. §211.15 (1987) (minimum 10% royalty for various minerals unless otherwise specified by Commissioner of Indian Affairs); 43 C.F.R. §3503.2-1 (1987) (no royalty limit on various BLM mineral leases).

⁸ Since statehood, the Arizona Constitution has incorporated restrictions on the disposal of school trust lands that closely track those in the Enabling Act. Ariz. Const. Art. X.

returns to the trust, and because it in some cases required the giveaway of trust assets. Pet. 24a-27a. The court rejected claims by the mines that minerals were exempt from the appraisal requirement, holding that the 1951 amendment to the Act evidenced a clear Congressional intent to exempt only oil and gas leases from that requirement. The court further found that, even before the 1951 amendment, the Jones Act had subjected minerals to the trust restrictions by requiring the state to hold its mineral lands "in the same way (to 'the same effect') as its non-mineral lands." Pet. 10a. Authority granted to the legislature to determine the "manner" of mineral leasing was not a blanket exemption, the court held, but rather simply power to regulate leasing procedures and terms in a manner consistent with the trust restrictions. Overall, the court concluded that it was bound to construe the relevant statutes in favor of protecting and preserving trust purposes, and that to permit "disposal of vast mineral deposits at less than true value" would be "completely contrary to the objective sought" by the Enabling Act. Pet. 14a.

SUMMARY OF ARGUMENT

Twenty-one years ago, this Court unanimously held that the trust restrictions in the Arizona Enabling Act were designed to ensure that the beneficiaries — the schoolchildren of Arizona — would receive the "full benefit" and the "most substantial support possible" from the school land grants.⁹ In sweeping terms, the Act mandates that "all" of the granted lands "shall be by said state held in trust" and that "disposition of any of said lands, or any money or thing of value directly or indirectly derived therefrom" contrary to the Act's provisions "shall be deemed a breach of trust." Act §28. In addition to placing the state in the role of trustee — a role that necessarily brought with it the duty to maximize returns and prevent dissipation of trust assets — the Act imposed the specific appraisal and true value requirements

⁹ *Lassen v. Arizona*, 365 U.S. 458, 467-68 (1967).

to make doubly sure that the schools would receive the maximum possible benefit from the grants.

Despite the comprehensive trust mandates of the Enabling Act, Arizona has for years leased trust mineral lands under a statute that actually prohibits prior appraisal, sets the same maximum royalty rate for all minerals, and in some cases mandates the outright giveaway of trust mineral assets. The statute acts as a clear and significant limitation on returns from school trust lands: one major lessee has paid nearly triple the statutory royalty rate for adjacent non-state mineral leases. The record also documents that the statute has in fact forced the state to literally give away millions of dollars in trust mineral assets.

It is undisputed that Arizona's mineral leasing practices fail to comport with the Act's specific true value and appraisal requirements. In addition, as a matter of basic trust law, the royalty statute flagrantly violates the state's fiduciary duty to maximize revenue and prevent the dissipation of trust assets. It is axiomatic that a trustee may not place a limit on potential returns from trust properties, and certainly may not give away trust assets.

As the court below found, the applicable statutes and legislative history simply do not support the mines' strained notion that minerals are somehow exempt from the trust restrictions. With respect to the appraisal requirement, Congress could not have been clearer: in the 1951 amendment to the Enabling Act, Congress expressly exempted oil and gas leases — and *only* oil and gas leases — from that requirement. Prior to that time, the Act had treated oil and gas leases as a subset of mineral leases, subject to precisely the same requirements. There can be no question, therefore, that Congress knew what it was doing when it subsequently exempted oil and gas leases, but not other mineral leases, from the appraisal requirement.

In authorizing the state legislature to determine the "manner" of mineral leasing, Congress was hardly abandoning the basic trust restrictions it had so painstakingly

laid out. Courts have consistently construed such language as merely allowing states to establish leasing forms and procedures consistent with the trust, not as a license to give away trust assets. Congress used identical language in authorizing the state to determine the "manner" of grazing leases on Arizona's trust lands, and this Court in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), nonetheless found such leases to be fully subject to the appraisal and true value requirements. Nor is there any merit in the mines' claims that Congress sought to exempt mineral leases from these restrictions because such leases are somehow impossible to appraise. There is no legislative history to support such an assertion, and this Court has specifically held that mineral rights are fully appraisable just as any other asset.

Even if the 1951 amendment to the Arizona Enabling Act were not dispositive, the language and purpose of the relevant statutes show that minerals in the school sections have always been subject to the trust restrictions. Although the 1910 Enabling Act did not grant school sections known at survey to be mineral in character, Congress knew that title to sections in which minerals were subsequently discovered would remain with the state. Nevertheless, Congress did not exempt such lands and the minerals therein from the school trust restrictions, which extend to every "thing of value" taken from the trust lands.

The 1927 Jones Act confirmed the entire grant of school sections to western states, regardless of the mineral character of those sections. By directing that this grant was to be "of the same effect" as the prior grants, Congress subjected these lands to the same trust restrictions as contained in the original enabling acts. Contrary to the mines' assertions, the Jones Act was not an independent grant of minerals to the states, but rather a confirmation and extension of the existing trusts. The language of the statute itself states that the prior grants "are hereby, extended," and the statute's title speaks of "[c]onfirming" in the states "title to lands granted by the United States in the aid of common or public schools." Jones Act of 1927, ch. 57, 44 Stat. 1026. To make

doubly sure that the minerals would be preserved for trust purposes, Congress inserted the added restriction that the mineral lands could only be leased — not sold.

Even if the Jones Act were an independent grant of mineral lands to the state for school purposes, that grant would simply constitute an addition to the existing trust corpus, and not the establishment of an entirely new and separate trust. The Arizona Constitution confirms that there is but one trust that consists of all lands granted by the original Enabling Act "and all lands otherwise acquired by the state." Ariz. Const. art. X, §1.

The 1936 amendment to the Arizona Enabling Act extended the permissible duration of mineral leases, but did not relax any of the other trust restrictions on such leases. There is no support for the mines' assertion that the 1936 amendment was intended to fill a supposed "gap" left by the Jones Act with respect to leasing of after-discovered minerals: The amendment made no distinction between the leasing of known and after-discovered mineral lands, and in any event the Jones Act had already extended the trust restrictions to all of these school sections. Likewise, the 1951 amendment to the Arizona Enabling Act liberalized trust restrictions only with respect to oil and gas leases, retaining the restrictions with respect to all other leases, including mineral leases.

Even if mineral leases were somehow exempt from the Act's specific appraisal and true value requirements, they would still be fully subject to general trust doctrines that prohibit maximum prices and the giveaway of trust assets. The mines do not seriously dispute that these minerals are part of a trust corpus to be managed for the benefit of the common schools. Nor have the mines argued that minerals are somehow exempt from the state's basic trust duty to maximize revenues and prevent the wasting of trust assets. The fixed-rate royalty statute plainly violates these duties, and cannot be justified based on speculation that it might encourage greater mineral production over time. The Ari-

zona legislature is entitled to no special deference on this issue: to the contrary, this Court has consistently held states to the highest fiduciary standards in their management of the school land trusts.

ARGUMENT

I. ARIZONA'S MINERAL ROYALTY STATUTE VIOLATES THE ENABLING ACT AND THE ARIZONA CONSTITUTION BY PRECLUDING PRIOR APPRAISAL, BY RESTRICTING THE REVENUES THAT CAN BE DERIVED FROM SCHOOL TRUST LANDS, AND BY REQUIRING THE GIVEAWAY OF TRUST ASSSETS.

It is undisputed that Arizona's mineral royalty statute does not comport with the appraisal and true value provisions of the Enabling Act and the Arizona Constitution.¹⁰ Those provisions unequivocally mandate that "all" school trust "lands, leaseholds, timber and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained." Under section 27-234.B of the Arizona Revised Statutes, the State Land Commissioner cannot and does not conduct prior appraisals of minerals leases, and cannot require payment of true value therefor.

¹⁰ The Arizona Supreme Court held that the royalty statute violated both the Enabling Act and article X of the Arizona Constitution. Pet. 2a, 24a, 29a. The same court has subsequently ruled that the school trust provisions in the Arizona Constitution are even more stringent than those in the Enabling Act. *Deer Valley Unified School Dist. v. Superior Court*, 760 P.2d 537 (Ariz. 1988). Thus, the decision below rests on independent and adequate state law grounds — namely, article X of the Arizona Constitution — and this Court should accordingly dismiss the case for lack of federal jurisdiction. *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). See also *Montana ex rel. Haire v. Rice*, 204 U.S. 291, 299-301 (1907).

In addition to the specific appraisal and true value requirements, the Act also imposes on the state the basic duties of a trustee. The Act declares that all of the granted lands and the products and proceeds therefrom "shall be by the said state held in trust," and that "[d]isposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom" for any object other than for trust purposes "shall be deemed a breach of trust." Act §28. "Words more clearly designed . . . to create definite and specific trusts . . . could hardly have been chosen." *Lassen v. Arizona*, 385 U.S. 458, 467 (1967) (citation omitted). Every court that has considered the issue has concluded that the school land grants to the western states "are real, enforceable trusts that impose upon the state the same fiduciary duties applicable to private trustees." *County of Skamania v. State*, 102 Wash. 2d 127, 132, 685 P.2d 576, 580 (1984).¹¹

Among other things, the state's fiduciary duty precludes it from setting limits on the revenues that can be derived from trust lands. The state must manage the granted lands so as to ensure that the beneficiaries enjoy the "full benefit" and "most substantial support possible" therefrom. *Lassen*, 385

¹¹ See also *Papasan v. Allain*, 478 U.S. 265, 270 (1986); *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042, 1049 (E.D. Wash. 1968), aff'd, 435 F.2d 561 (9th Cir. 1970); *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 248-49, 47 N.W. 2d 520, 522-23 (1951); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 236 (Okla. 1982).

U.S. at 468.¹² Accordingly, statutes that limit the state's ability to derive maximum revenues from the trust have uniformly been invalidated. See, e.g., *State Land Dept. v. Tucson Rock and Sand Co.*, 107 Ariz. 74, 481 P.2d 867 (1971) (statutory limit of \$.05 per cubic yard on royalty for sand and gravel extracted from trust lands held a breach of trust); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230 (Okla. 1982) (statutes setting maximum rents for trust lands and maximum interest rates on loans from school trust fund held to illegally "interfere with the duty of the State as Trustee to maximize the return to the trust estate").¹³

Under these basic trust principles, there can be no question that Arizona's mineral royalty statute imposes an invalid limitation on returns from school trust lands. The

¹² Numerous courts have declared that, under the school land trusts, states have the fiduciary duty to derive maximum benefit from any disposition of trust lands. E.g., *State v. University of Alaska*, 624 P.2d 807, 817 (Alaska 1981) (implied intent of grant in trust "was to maximize the economic return from the land for the benefit of the university"); *Anderson v. Board of Educ. Lands and Funds*, 198 Neb. 793, 795, 256 N.W.2d 318, 320-21 (Neb. 1977) (trustee of state lands has a "duty" to "obtain the maximum return to the trust estate from the trust properties under its control"); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 236 (Okla. 1982) (statutes governing trust lands may not "interfere with the duty of the State as Trustee to maximize the return to the trust estate"); *County of Skamania v. State*, 102 Wash. 2d 127, 136, 138, 685 P.2d 576, 580-83 (1984) (state must obtain "full value" and "best possible price" when disposing of trust assets).

¹³ See also *State v. University of Alaska*, 624 P.2d 807, 813 (Alaska 1981) (appropriation of trust lands for use as public park unlawfully restricted ability of state to maximize economic return therefrom); *Department of State Lands v. Pettibone*, 702 P.2d 948, 954, 956 (Mont. 1985) (any law infringing on state's management prerogatives so as to devalue trust lands held impermissible); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 47 N.W.2d 520 (1951) (statute arbitrarily fixing valuation of school lands without regard to fair market value is void as breach of trust); *Fox v. Kneip*, 260 N.W.2d 371, 374 (S.D. 1977), cert. denied, 436 U.S. 918 (1978) (statutory formula for calculating rental rates for trust grazing leases cannot constitutionally impose maximum limit on rentals).

statute sets an arbitrary and absolute cap of 5% on the royalties that can be charged for trust minerals, a rate that cannot be varied based on the location of the mineral deposit or the specific materials involved. The limitation is all the more significant because the royalty is the only income that the state realizes from disposition of the minerals. No private trustee could, in good faith, tie its hands in the way the State of Arizona has with respect to the sale of school trust minerals.

Accordingly, the royalty statute is, on its face, a breach of trust. See *Murphy v. State*, 65 Ariz. 338, 353, 181 P.2d 336 (1947) ("every act of the legislature that in any manner circumvents the plain provisions of the Enabling Act is . . . void"). In addition, the record conclusively demonstrates that the 5% statutory limit is in fact a very significant restriction on trust returns. The court below found it to be undisputed that Arizona has one of the lowest royalty rates in the nation. Pet. 25a. According to the Arizona Auditor General, the state could have earned millions of dollars more in mineral revenues had its royalty rate been comparable to that in other states in just one year studied. The 5% limit is substantially below the presumptive minimum of 10% for minerals extracted from Indian lands and the statutory minimum of 12.5% for surface mined coal. 25 C.F.R. §211.15 (1987); 30 U.S.C. §207. Royalties as high as 14% have been charged on Indian mineral leaseholds directly adjacent to state school trust leaseholds on which the state has been strictly limited to a 5% return.

Finally, the royalty statute flatly violates the state's trust duty to prevent the loss of trust assets. See Restatement (Second) of Trusts §§176, 181 (1959); G. Bogert, *Trusts* §§99, 101 (6th Ed. 1987). Because the statute calculates royalties as a percentage of net value — that is, the value after deduction of production costs — it in some cases requires the state to literally give away trust minerals (where, for example, production costs exceed the sales price). This was graphically illustrated in November 1983 when one mining company paid *no royalties whatsoever* for millions of dollars

worth of minerals taken from a school trust leasehold. Of course, it is axiomatic that the state as trustee "cannot give away trust property." *Kanaly v. State*, 368 N.W.2d 819, 824 (S.D. 1985).

The mines assert that the fixed-rate royalty statute can somehow be justified as encouraging mineral production and thereby increasing trust income over the long haul.¹⁴ But this Court expressly rejected such a speculative approach to the valuation of school trust lands in *Lassen v. Arizona*, 385 U.S. 458, 468-69 (1967). There it was argued that the state highway department's acquisition of school trust lands for highway purposes would have an overall beneficial affect on the value of the remaining school trust lands, and that the price to be paid by the highway department should be offset by the amount of this enhanced value as established by expert testimony. The Court squarely rejected the argument, holding that any prediction of future enhanced value, "resting as it largely would upon the forecasts of experts which by nature are subject to the imponderables and hazards of the future," would "fall[s] short of assuring accomplishment of the basic intentment of Congress" in establishing the trust. *Id.* at 468-69. See also *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295, 302-303 (1976) (at the time of any disposition of trust land, trust must receive the "then full value of the particular interest which is being dispensed"). Likewise, the state as trustee may not give away trust mineral assets or dispose of them at below market value based on mere speculation that this will somehow result in greater long-term revenue.¹⁵

In any event, the court below correctly found that higher royalty rates did not necessarily discourage exploration and production. Pet. 25a. The data for ASARCO's mining operations in Arizona confirm this conclusion. On ASARCO's

¹⁴ In support of this proposition, the mines have relied on an unpublished paper by a law student. R. 83, App. 6.

¹⁵ See also *Ervien v. United States*, 251 U.S. 41, 47-48 (1919).

Indian leases, under which royalty rates fluctuate, production levels have actually been higher in several years when royalty rates were higher. R.75, Exh. B. Moreover in 1977 and 1983, ASARCO produced a greater net value in minerals from its Indian leases than it did from its adjoining state lease, even though it was paying the Indians a higher royalty rate in each of those years. *Id.*

II. MINERAL LEASES ON SCHOOL TRUST LANDS ARE NOT EXEMPT FROM THE ENABLING ACT'S APPRAISAL AND TRUE VALUE REQUIREMENTS.

A. The Express Exemption Of Oil And Gas Leases From Appraisal Conclusively Shows That Other Leases Are Not Exempt.

The "starting point for interpreting a statute is the language of the statute itself" and "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108 (1980). In this case, the Court need look no further than the current terms of the Arizona Enabling Act to conclude that mineral leases are plainly not exempt from the appraisal and true value requirements. Section 28 of the Act authorizes the leasing of trust lands for grazing, agricultural, commercial, domestic, mineral and oil and gas purposes, all in a manner to be prescribed by the legislature. In the very same clause, the Act also expressly exempts oil and gas leases from "advertisement, bidding, or appraisement." No such express exemption is provided for any other kinds of leases, including mineral leases. Act §28. Clearly, Congress felt that it had not waived the appraisal requirement merely by authorizing the state legislature to determine the "manner" of leasing. And "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980).

The mines suggest that Congress was dealing only with oil and gas leases in the 1951 amendment, (establishing a "new regime" — Pet. Br. at 39), and that its failure to expressly exempt mineral leases from the appraisal requirement was simply an oversight. This claim ignores the fact that, in drafting the amendment, Congress considered and rejected a proposal to exempt mineral leases from even the advertisement requirement.¹⁶ Moreover, the prior version of §28 as amended in 1936 treated oil and gas leases as a subset of mineral leases: It specifically authorized the leasing of trust lands "for mineral purposes (including leases for exploration of oil and gas and extraction thereof) for a term of twenty years or less." Act of June 5, 1936, Ch. 517, 49 Stat. 1477. In order to provide the special exemption for oil and gas leases under the 1951 amendment, Congress therefore had to *deliberately separate* the treatment of oil and gas leases from the treatment of other mineral leases: There was, in short, no accident or oversight in failing to exempt mineral leases other than oil and gas from appraisal.

The mines further urge the Court to presume that Congress in 1951 was confused and mistaken in believing that mineral leases were subject to the trust restrictions and in concluding that special exemption language was needed to waive appraisal for oil and gas leases. Pet. Br. at 40. Aside from trying to second-guess Congress, the argument is simply irrelevant: the plain fact is that Congress in 1951 evidenced an unmistakable intent that oil and gas leases should be exempt from the appraisal requirement, and that other

¹⁶ As originally introduced in the Senate, the amendment would have expressly permitted grazing, agricultural, and mineral leases "without advertisement." S. Rep. No. 194, 82d Cong., 1st Sess. 5 (1951). The Senate committee decided to eliminate this exemption for all but oil and gas leases, in order to place Arizona "on an equal footing with the greater number of her sister states in respect to the type of leases for which provision is made." *Id.* at 2. The committee report specifically cited the leasing provisions in enabling acts from seven western states, six of which contained no express exemption from advertisement as to grazing, agricultural and mineral leases. *Id.* at 3, 5-6.

leases should not be so exempt. This most recent expression of Congressional intent controls regardless of whether it was triggered by a correct or incorrect view of pre-existing law. Cf. 2A N.J. Singer, *Sutherland Statutory Construction* §51.02 (Sands 4th Ed. 1984) (hereinafter "Sutherland"). In any event, as further set forth in Part II.D. *infra*, Congress was absolutely correct in concluding that mineral leases (including oil and gas leases) were fully subject to the trust restrictions under prior versions of the Enabling Act, and this view of prior law as evidenced in the 1951 amendment "is entitled to great weight." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969). Significantly, it was not only Congress that so read prior law: the 1951 amendment was sought by the State of Arizona because the state felt that the trust restrictions such as advertisement and appraisal *did* apply to oil and gas leases and that such restrictions were inhibiting oil and gas development. S. Rep. No. 194, 82d Cong., 1st Sess. 1, 2, 4 (1951).

The mines further seek support from a general statement in the Senate report expressing a belief that the state legislature could best determine procedures for producing income from and obtaining the maximum utilization of the granted lands. *Id.* at 2. Such a statement hardly suggests a total exemption of the state from trust restrictions: rather, it simply indicates that the state can establish leasing methods consistent with the trust. See Part II.B. *infra*. In any event, the context in which the above-referenced statement appears shows that the committee was referring only to the state's authority to set procedures for oil and gas leases, as these were the only leases for which procedures were being liberalized.

The mines truly distort the legislative history in making the incredible assertion that Congress actually intended to "liberalize" restrictions on mineral leasing by refusing to exempt such leases from the advertisement requirement. Pet. Br. at 40-41. The mines strain to support this view by first citing the committee's stated purpose in removing the advertisement exemption — namely, to place Arizona on an equal

footing with other states as to this provision — and by then citing a completely unrelated statement elsewhere in the report that sister states had been able progressively to liberalize the terms of leases. From the context of the report, it is manifest that the liberalization being referred to by the committee was in the permissible *duration* of oil and gas leases — not in terms governing advertisement of other leases. The report specifically cited provisions of enabling acts for seven other western states, none of which restricted the term of oil and gas leases. S. Rep. No. 194, *supra* at 2-3. In all but one of these states, however, the advertisement requirement applied to all dispositions of trust lands, and mineral leases were not exempted from that requirement. *See id* at 5-6.¹⁷ Thus, to place Arizona on an "equal footing" with those states with respect to the advertisement requirement, Congress determined that no exemption from that requirement should be allowed in the Arizona Enabling Act. *Id* at 2.

The mines cite a reference in the Senate report to an "exemption" under the 1936 Amendment for agricultural and grazing leases as evidence that leases were to be exempt from all trust restrictions. Pet. Br. at 41, citing S. Rep. 194, *supra* at 2. The "exemption" referred to in the report was not an exemption from the Act's appraisal and true value requirements: Rather, it was the exemption provided for agricultural and grazing (and mineral) leases from the Act's prohibition on mortgages and other encumbrances. The third paragraph of §28 of the Act provides that "[n]o mortgage or other incumbrance" of trust lands shall be allowed. As this Court has explained in the context of grazing leases, however:

¹⁷ The relevant Enabling Act provisions are as follows: Idaho Admission Bill, ch. 656, §5, 26 Stat. 215 (1890); New Mexico Const. art. XXIV (ratified by Congress by Act of Feb. 8, 1928); North Dakota, South Dakota, Montana and Washington Enabling Act, ch. 180 §11, 25 Stat. 676, (1889); Wyoming Admission Act, ch. 664 §5, 26 Stat. 222, (1890).

§28 goes on to authorize specifically a lease of trust land for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value." These provisions thus plainly contemplate the possibility of a lease of trust land and, in so doing, intimate that such a lease is not a prohibited "mortgage or other encumbrance."

Alamo Land & Cattle Co. v. Arizona, 424 U.S. at 306 (citations omitted). Thus, this Court has specifically recognized that the Act's leasing provisions are exemptions from the prohibition on encumbrances, but not from the appraisal and true value requirements. The 1951 amendment to the Act simply extended this exception to homesite and commercial leases — leases that had not been expressly recognized as permissible under the prior version of the Act. There was not, and never has been any intent by Congress to exempt all of these leases from the appraisal and true value requirements.

B. Congress Did Not Intend To Exempt Mineral Leases From The Appraisal And True Value Requirements When It Authorized The State To Determine The "Manner" Of Leasing.

The mines' entire exemption argument rests on the proposition that by allowing leasing "as the legislature may direct" or "in such manner" as the legislature may provide, Congress intended to obliterate the Act's specific trust restrictions with respect to minerals. Of course, the 1951 amendment to the Enabling Act completely refutes this view: If the grant of legislative authority in that Act to determine the "manner" of oil and gas leasing were sufficient by itself to waive the trust restrictions, Congress would not have bothered to go on to add an express exemption of such leases from the trust restrictions. Moreover, as the court below held, the language authorizing leasing "ought not to be interpreted so broadly as to destroy the entire objective of the statutory scheme." Pet. 14a. The school land grants must be strictly construed in favor of protecting and preserving trust purposes. *See United States v. New Mexico*,

536 F.2d 1324, 1326-27 (10th Cir. 1976). If given the broad construction urged by the mines, the "such manner" language would allow state legislatures to literally give away trust assets as long as they did so via the formality of a lease.

For these reasons, the sensible and consistent construction of the language authorizing the legislature to determine the "manner" of leasing, is as stated by the court below: namely, as giving the legislature only the power to set leasing procedures not in conflict with the express terms of the Enabling Act. Pet. 15a. Such a reading was followed by this Court when it applied the appraisal and true value requirements to grazing leases in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976). As with mineral leases, the 1951 amendment to the Enabling Act permitted grazing leases "in such manner as the Legislature of the State of Arizona may prescribe." The Court nevertheless found that the Act's appraisal and true value requirements applied to such leases:

The New Mexico-Arizona Enabling Act has a protective provision against the initial setting of lease rentals at less than fair rental value. This is specifically prohibited by §28. . . . Thus, if the lease of trust lands calls for a rental of substantially less than the land's then fair rental value, it is null and void . . .

424 U.S. at 304-05. The Court went on to hold:

§28 . . . authorize[s] specifically a lease of trust lands for grazing purposes for a term of 10 years or less, and further provides that a leasehold, before being offered, shall be appraised at "true value."

424 U.S. at 306.

The mines try to distinguish *Alamo* by asserting that the case did not involve a mineral lease, but that difference is immaterial: both mineral leases and grazing leases are authorized "in such manner as the Legislature . . . may prescribe," and that language hardly has a different meaning with respect to the former than with respect to the latter. Likewise, the mere fact that this Court in *Alamo* did not dwell on

the "in such manner" language hardly undermines the Court's explicit holding that leases were subject to appraisal. Rather, as the Solicitor General had noted, this "simply emphasizes that a natural reading of §28 does not suggest that by that phrase Congress intended to free the state from the specific restrictions of the Enabling Act."¹⁸ Other courts that have considered the issue have uniformly reached the same result.¹⁹

The broad reading of the "in such manner" language urged by the mines would literally eviscerate the school land trusts throughout the West. As in Arizona, the enabling acts and constitutions for many western states authorize the state legislatures to determine the manner of mineral leasing. Although the precise terminology varies, the general pattern is to allow leasing "as the legislature may direct" or "under such rules and regulations" as the legislature may

¹⁸ Brief for the United States as Amicus Curiae, September 1988 at 13-14 (On Petition for Writ of Certiorari in the instant case).

¹⁹ *Trustees for Alaska v. State*, 736 P.2d 324, 338 n.29 (Alaska 1987), cert. denied, sub nom., 108 S. Ct. 2013 (1988) (language in statehood act authorizing mineral leasing "as the state legislature may direct" does not give the state discretion to charge no rent or royalties); *State Land Dept. v. Tucson Rock & Sand*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970) (the phrase "such manner as the legislature may direct" does not permit disposal free from §28 restrictions, but merely gives the legislature authority to regulate the manner in which the lease is made and to set lease terms not in conflict with §28), vacated on other grounds, 107 Ariz. 74, 481 P.2d 867 (1971); *State ex rel. Ebke v. Board of Educ. Lands and Funds*, 154 Neb. 244, 254, 47 N.W.2d 520, 525 (1951) (legislative power to provide for method of leasing school lands is subject to law governing the administration of trusts); *Oklahoma Educ. Ass'n v. Nigh*, 642 P.2d 230, 237 (Okla. 1982) (legislative power to set rules for leasing trust property cannot be used to set maximum prices for trust assets).

prescribe.²⁰ These provisions govern not only mineral leases, but also virtually every other type of lease that states might offer, including grazing, agricultural, and commercial leases. If legislative authority to determine the "manner" of these leases means that they are free of specific trust restrictions in the respective enabling acts, then the states will be able to accomplish by lease the very thing that Congress sought to prevent in establishing the trust restrictions: namely, the dissipation of trust assets at far below market value. Plainly, the unbridled legislative authority urged by the mines is wholly incompatible with the purpose of the school land trusts.

C. The Enabling Act's Mineral Leasing Provisions Were Not In Any Way Motivated By A Perceived Difficulty In Appraising Mineral Leases.

The only explanation offered by the mines as to why Congress would exempt minerals from trust restrictions is that mineral leases are supposedly impossible to appraise. There is not one shred of evidence in the legislative history to suggest that Congress was in any way motivated by such a consideration in allowing the legislature to provide for the "manner" of mineral leasing. Indeed, Congress used precisely the same language to authorize ten-year grazing, domestic, agricultural and commercial leases. The mines make no claim that these sorts of leases are also impossible to appraise.

In any event, the notion that mineral leases somehow evade appraisal is wholly without merit. Long before adoption of the Enabling Act, this Court ruled that mineral

²⁰ See, e.g., Alaska Statehood Act, Pub. L. No. 85-508, §6(i), 72 Stat. 339 (1958); Colo. Const. art. IX, §10; Hawaii Admission Act, Pub. L. No. 86-3, §5, 73 Stat. 4 (1959); Idaho Admission Bill, ch. 656 §5, 26 Stat. 215 (1890); North Dakota, South Dakota, Montana and Washington Admission Act, ch. 180 §11, 25 Stat. 676 (1889); Oklahoma Enabling Act, ch. 3335 §§9 & 10, 34 Stat. 267 (1906); Utah Const. art. XX, §1; Wyoming Act of Admission, ch. 664 §5, 26 Stat. 222 (1890).

claims were appraisable, just as any other property interest. In *Montana Ry. Co. v. Warren*, 137 U.S. 348 (1890), a condemnation case, the Court held that the value of a mining claim could be established by the testimony of witnesses familiar with the area, even though the presence of minerals had not been proven. The mere fact that the value of the claim was speculative did not preclude a credible appraisal:

That this mining claim, which may be called "only a prospect," had a value fairly denominated a market value, may . . . be affirmed from the fact that such "prospects" are the constant subject of barter and sale. Until there has been full exploiting of the vein its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet, *uncertain and speculative as it is, such "prospect" has a market value*; and the absence of certainty is not a matter of which the [condemnor] can take advantage, when it seeks to enforce a sale.

Id. at 352-53 (emphasis added). Subsequent decisions have consistently followed this rationale in holding that mineral interests are fully appraisable.²¹

Contrary to the mines' assertions, an appraisal for mineral leasing purposes does not have to await exploration and development. The true value of a property interest is akin to its fair market value; that is, the price that a willing buyer would be willing to pay a willing seller. See Black's Law Dictionary 537 (5th Ed. 1979). Even if information about the mineral deposit is limited, the State Land Commissioner can at a minimum survey the market to determine what royalty rates are generally being charged on comparable leases both within Arizona and in other states. It is not essential that

²¹ E.g., *United States v. 179.26 Acres of Land*, 644 F.2d 367, 372 (10th Cir. 1981); *United States v. Silver Queen Mining Co.*, 285 F.2d 506, 510 (10th Cir. 1960); *Phillips v. United States*, 243 F.2d 1, 5-6 (9th Cir. 1957); *Cal-Bay Corp. v. United States*, 169 F.2d 15 (9th Cir.), cert. denied, 335 U.S. 859 (1948).

the Commissioner know in advance precisely the nature and extent of the mineral deposit: rather, he simply needs to determine what a willing lessee would, under all the circumstances, be willing to pay. See Rocky Mountain Mineral Law Foundation, 4 American Law of Mining §27.10 (1982).

The only language the mines can cite referencing the supposed difficulty of mineral appraisal is a one sentence statement by Interior Secretary Fall in 1921 hearings on a bill that never passed and that bore little resemblance to the 1927 Jones Act or subsequent amendments to the Arizona Enabling Act.²² Such a statement is obviously entitled to no weight whatsoever in determining Congressional motives: ordinarily, even the contemporaneous remarks of a legislator who sponsors a bill are not controlling in analyzing legislative history. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 118 (1980). Equally unsupportive is the mines' reliance on language in a Senate report merely indicating that the mineral character of land is sometimes not determined until exploration work has been carried out. Pet. Br. at 31, citing S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926). The cited portion of the report says nothing whatsoever about mineral leasing or the supposed difficulty of appraisals in connection therewith.

D. Minerals In School Trust Lands Have Always Been Subject To The Appraisal And True Value Requirements.

Even if the 1951 amendments to the Arizona Enabling Act were not so dispositive of the issue, the history of the school land trust plainly shows that Congress always intended that minerals would be fully subject to the appraisal and true value requirements. The trust restrictions were the "most important" provisions of the Enabling Act,²³ and there is no evidence that Congress had any desire or

²² See Pet. Br. at 31.

²³ See *Lassen v. Arizona*, 385 U.S. at 468.

plan to abandon those carefully crafted safeguards with respect to trust mineral assets.

1. Minerals that passed to the state under the 1910 Enabling Act were fully subject to trust restrictions.

Contrary to the mines' assertions (Pet. Br. 23-26), reservation of known mineral lands from the 1910 grant did not act to exempt all minerals in all school sections from the trust restrictions. At the time of the 1910 Act, Congress knew that some school sections with minerals would still be included in the trust grant because they were not then known to be mineral in character.²⁴ Congress did not, however, in any way exempt such lands or the minerals therein from the trust restrictions. Instead, it broadly included in the trust "all lands" conveyed by the Act and "the natural products and money proceeds" thereof. The word "lands" as used in the Enabling Act has long been held to include any minerals therein. *Campbell v. Flying V Cattle Co.*, 25 Ariz. 577, 584-85, 220 P. 417, 419 (1923). Thus, except where school sections were withheld from the grant altogether because of their known mineral character, those lands and the minerals in them were expressly made part of the school land grant. See *Texas Pacific Coal & Oil Co. v. State*, 125 Mont. 258, 234 P.2d 452 (1951) (after-discovered minerals and the school sections in which they were found are part of school trust and subject to trust restrictions).

The mines seek support from the dubious opinion in *Neel v. Barker*, 27 N.M. 605, 204 P. 205 (1922) where the New Mexico Supreme Court held that certain trust restrictions in

²⁴ The "after discovery" of minerals in school sections was a common occurrence in the land grant states. See *Title to Lands Granted by the United States in Aid of Schools: Hearings on S. 564 Before the House Comm. on Rules*, 69th Cong., 2d Sess. (1926) (hereinafter "House Hearings"). Long before 1910, this Court had ruled that after-discovered minerals and the school sections in which they were found were to be treated as having passed to the states as part of the original school grant. *Shaw v. Kellogg*, 170 U.S. 312, 332-33 (1898).

the New Mexico Enabling Act did not apply to minerals because of the mineral reservation in the original school grant. *Neel* has been squarely rejected by the supreme courts of two states, both of which found the decision to be wholly inconsistent with Congressional intent to establish comprehensive school land trusts.²⁵ *Neel* was given so little credence in New Mexico itself, that the state felt it necessary to request Congressional authority to expressly exempt minerals from the trust restrictions. This request was prompted by the concerns of numerous New Mexico mineral lessees who felt their leases — issued without compliance with all trust procedures — were still clouded despite *Neel*. See S. Rep. No. 90, 70th Cong., 1st Sess. 2 (1928).

In subsequently granting New Mexico's request and expressly authorizing mineral leases in New Mexico without advertisement or appraisal, Congress plainly evidenced a belief that such exemptions were *not* allowed under the original Enabling Act. S.J. Res. 38, 45 Stat. 58 (1928). If the *Neel* court had been correct and minerals truly were exempt under the original 1910 Act, then no additional exemption language would have been necessary.²⁶ The New Mexico experience shows once again that when Congress wants to waive trust restrictions, it expressly says so. Congress has *never* granted

²⁵ *Texas Pacific Coal & Oil Co. v. State*, 125 Mont. 258, 264, 234 P.2d 452, 455 (1951); *State ex rel. Rausch v. Amerada Petroleum Corp.*, 78 N.D. 247, 254-55, 49 N.W.2d 14, 19 (1951).

²⁶ Contrary to the mines' assertions, there is absolutely nothing in the legislative history suggesting that Congress felt the *Neel* decision was a correct reading of the then-existing law. Instead the Senate Report indicated that, despite *Neel*, there was a "serious question" as to the validity of leases that had been issued without compliance with the trust restrictions. S. Rep. No. 90, 70th Cong., 1st Sess. 2 (1928).

a similar express exemption of minerals from the specific trust restrictions of the *Arizona Enabling Act*.²⁷

The mines wrongly assert that Arizona's 1915 mineral royalty statute provides contemporaneous support for the exemption of mineral leases from appraisal. In reality that statute *allowed* the Land Commissioner to appraise and collect true value — unlike the current statute that prohibits him from doing so. 1915 Ariz. Sess. Laws 13, 27-28. Nor does the lack of trust enforcement action by the Attorney General in years immediately following 1910 have any significance whatsoever: Arizona's 1915 mineral royalty statute was not on its face violative of the Enabling Act, and in any event failure of the United States to enforce the Act is hardly tantamount to a clean bill of health. Cf. *Lassen*, 385 U.S. at 465-66, 469 n. 22.

Finally, the mines are simply incorrect in claiming that, at the time of the *Arizona Enabling Act*, Congress followed some sort of general policy against applying trust restrictions to minerals. In the 1906 Oklahoma Enabling Act, Congress expressly required competitive bidding for mineral leases, directing state officials to set an initial royalty rate for each lease and accept bonus bids on top of that. Oklahoma Enabling Act, ch. 3335 §8, 34 Stat. 267, 273 (1906). During deliberations on the *Arizona Enabling Act*, the Act's sponsor Senator Beveridge spoke approvingly of the Oklahoma trust restrictions, and indicated his belief that the restrictions in the *Arizona Act* were even more stringent:

²⁷ Significantly, the *Neel* decision and subsequent Enabling Act amendments have been read very narrowly in New Mexico as exempting mineral leases only from *formal* appraisal and advertisement in every case. The New Mexico Land Commissioner takes the position that he is *still* under a trust duty to determine and obtain full value for mineral leases and that the exemptions in the Act merely allow him to choose the method: e.g., formal or informal appraisal or advertisement, public sale and competitive bidding. SR 8 at 7-8.

We have thrown conditions around land grants in several states heretofore, notably in the case of Oklahoma, but not so thorough and complete as this.

45 Cong. Rec. 8227 (1910). Thus the application of trust restrictions to minerals was completely consistent with the trend then being followed by Congress.

2. The Jones Act of 1927 confirmed applicability of the trust restrictions to all mineral and nonmineral school sections.

If there were any doubt that the Act's trust restrictions applied to mineral lands, that doubt was conclusively resolved by the terms of the Jones Act, which expressly "extended" the original enabling acts to encompass all of the numbered school sections regardless of their "known" mineral character:

[T]he several grants to the States of numbered sections in place for the support or in aid of common or public schools be, and they are hereby, extended to embrace numbered school sections mineral in character ... (a)

... [T]he grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections.

44 Stat. 1026 (1927) (emphasis added). The effect of this language was unambiguous: It no longer mattered whether a school section was known to be mineral in character at the time of an original enabling act grant. The land would be included in the trust regardless of its mineral or non-mineral character, and it would be treated precisely like any other sections granted under the original enabling act.

Contrary to the mines' assertion, Congress's direction that the grant of mineral lands "shall be of the same effect" as the original grants did not refer to the "mechanics" of the vesting of title. As the text of the statute clearly shows, Con-

gress addressed the mechanics of title vesting in a completely separate clause: "[T]he grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, and titles to such numbered mineral sections shall vest in the States at the time and in the manner ... recognized by existing law ..." 44 Stat. 1026 (emphasis added). The mines' reading would render the two parts of this provision redundant: the phrase before the highlighted "and" would mean precisely the same thing as the phrase appearing after it. Such a reading would violate the well-settled rule of statutory construction that each word and clause of a statute must be given effect, and that Congress will not be presumed to have included redundant or duplicative language. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The phrase "to the same effect" must be read independently and given its plain, ordinary meaning. Because "effect" means "outcome" or "result,"²⁸ Congress plainly intended that the outcome or result of the Jones Act grant would be precisely the same as that of the original grants: namely the inclusion of the referenced sections in the school land trusts subject to all of the same provisions and restrictions.²⁹

Equally unfounded is the mines' effort to characterize the Jones Act as an "independent" grant totally unconnected with the original enabling acts. By its express terms, the Jones Act "extended" the prior school land grants: an unmistakable statement that the 1927 Act was directly connected to the prior grants. Likewise, the title of the Act, which serves as an indication of Congressional intent,³⁰ speaks explicitly of "Confirming in States and Territories title to lands granted by the United States in the aid of common or public schools." Ch. 57, 44 Stat. 1026 (1927) (empha-

²⁸ Black's Law Dictionary 461 (5th Ed. 1979).

²⁹ The legislative history cited by the mines does not show that subsection (a) of the Jones Act was necessarily "drafted" by Interior Secretary Work (Pet. Br. at 32-33), nor does the Secretary's failure to discuss the "same effect" language show anything at all about Congress's intended meaning.

³⁰ See, e.g., *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-89 (1959).

sis added). Moreover, because the Jones Act and the various enabling acts all deal with the same subject — namely, the granting of lands for the common schools — they are acts *in pari materia* which “are to be taken together, as if they were one law.” *United States v. Stewart*, 311 U.S. 60, 64 (1940). See also 2A Sutherland §51.02 at 453 (new statute is presumed in accord with legislative policy in prior statutes on same subject). The rule requiring joint construction of statutes is particularly strong with respect to federal land grants, which are often enacted in stages to create land systems.³¹

The legislative history conclusively demonstrates that Congress intended the Jones Act as an amendment to the prior school land grants, not as a totally new and independent grant. The Senate Report described the bill as “relinquish[ing]” to the states title to the numbered mineral sections and as “remov[ing] a condition under existing school-grant legislation” that had clouded the states’ titles to school sections and “defeated” the “purpose for which they were granted.” S. Rep. No. 603, 69th Cong., 1st Sess. 1, 5 (1926). In so doing, the bill would “render immediately enjoyable” by the states “the benefits intended to be conferred by Congress in enacting the school grant legislation.” *Id.* at 3 (emphasis added). Likewise, the House Report explained that the bill was necessary to remove clouds on the school section titles “which prevent to a large extent the realization of the purposes intended by the grant itself.” H.R. Rep. No. 1761, 69th Cong., 2d Sess. 3 (1927) (emphasis added). The report emphasized that the Jones Act dealt “only with those lands which were granted to the states by Congress in their enabling acts for the benefit of their common and public schools.” *Id.* (emphasis added). Other state-

ments in the House Hearings reiterated that the 1927 Act was designed to “carry out the original purpose of the grant,” and to prevent the loss of the “sacred fund” that had been established for school children. House Hearings at 7, 23.

Even if the Jones Act could be viewed as a separate, independent grant of mineral lands to the state, those lands would still be included Arizona’s school land trust. Under the Arizona Constitution the trust and its restrictions extend not only to “[a]ll lands expressly transferred” to the state under the Enabling Act, but also to “*all lands otherwise acquired* by the State.” Ariz. Const. art. X, §1 (emphasis added). The provision for inclusion of “otherwise acquired” lands in the trust was based on the expectation that the federal government “would make additional grants for the identical uses and purposes specified in the Enabling Act.” *Murphy v. State*, 65 Ariz. 338, 355, 181 P.2d 336, 353 (1947). Such additional lands were to be subject to the same trust restrictions as the originally granted lands. *Id.*; Ariz. Const. art. X, §1. Arizona confirmed this approach by specifying in 1915 that the “permanent common school fund shall consist of the proceeds of all lands that have been or may be granted to this state by the United States for the support of common schools.” 1915 Ariz. Sess. Laws Ch. 5 §95 (emphasis added). Thus, even before the time of the Jones Act, the law was firmly established that any additional land grants to Arizona for school purposes would be subject to precisely the same trust restrictions as provided in the original Enabling Act.

Because the Jones Act was plainly intended to enhance, rather than undermine the school trusts, its provisions prohibiting the sale of the granted mineral lands are logically read as an *added* precaution against the dissipation of trust assets — not the only protection, as asserted by the mines. Basic rules of statutory construction require that the provisions of the earlier enabling acts be read together with those of the Jones Act “so that effect is given to every provision in

³¹ See, e.g., *Johanson v. Washington*, 190 U.S. 179, 184 (1903) (in construing school land grants, court must “read all parts of them together”); *Ryan v. Carter*, 93 U.S. 78 (1876) (various laws passed from time to time regarding lands in certain territories are all *in pari materia* and to be regarded as one statute); *Pollard’s Heirs’ Lessee v. Kibbe*, 39 U.S. 353 (1840) (two land grants twelve years apart were *in pari materia* and should be construed together).

all of them." 2A Sutherland §51.02 at 453.³² Moreover, a bare prohibition on the sale of mineral lands with no other dispositional restrictions whatsoever would hardly be sufficient to protect the trust: states would still be able to give away trust minerals under the facade of leases, leaving the trust with worthless empty holes in the ground after the leased deposits were exhausted. Congress plainly did not intend such a result when it granted these lands for support of the common schools.

Contrary to the mines' claim, Congress did not suddenly in 1927 decide that restrictions were no longer necessary in school land grants and that states could be trusted completely in the management of school lands. If Congress were indeed so deferential, it would not have prohibited the states even from selling the mineral lands: nor would it have continued in effect the specific trust restrictions in the various enabling acts. The mines cite a few isolated, general statements in the legislative history to the effect that the states ought to be treated as sovereigns and relied upon to manage the school lands, but these statements were made in response to proposals that the Department of Interior, rather than the states, be allowed to manage mineral lands for support of the schools: they were hardly endorsements of the waiver of all trust restrictions. See, e.g., S. Rep. No. 603, *supra*, at 10-11; House Hearings, *supra*, at 3-7.³³ Even more irrelevant is the mines' observation that the Jones Act legislative history says nothing about mineral appraisal or auc-

³² See also *United States v. Jefferson Elec. Mfg. Co.*, 291 U.S. 386, 396 (1934) (new enactments on subject covered by system of general statutes should be lifted in to existing system and given effect conformably thereto).

³³ Also unsupportive is the mines' incorrect, out of context paraphrasing of Congressman Morrow (not an author of the bill) as having suggested that, under the Jones Act, state leasing procedures would be the "complete safeguard" of the trust lands. Pet. Br. at 30. In reality, Mr. Morrow indicated that some states would "fail" to adequately protect their school lands unless they enacted legislation "as a complete safeguard for the trust." 68 Cong. Rec. 1820 (1927).

tion: Congress had no need to address these matters, because they were already covered in the existing enabling acts. The purpose of the Jones Act was simply to bring all mineral lands within the respective school lands trust — not to change the dispositional restrictions in those trusts.

The mines assert that it would have been somehow irrational for Congress, through the Jones Act, to impose more stringent trust restrictions on Arizona than on earlier-admitted states. But the Jones Act did not by itself impose different trust restrictions on any of the states: rather it simply brought minerals within the existing trust restrictions. To the extent the Arizona Enabling Act was more stringent than those in other states, it was because Congress in 1910 thought it should be: there was no need to re-evaluate the issue in 1927. Nor was there any reason for Congress in 1927 to turn its back on the carefully considered restrictions it imposed on Arizona only 17 years earlier.

3. The 1936 and 1951 amendments to the Enabling Act show that Congress considered minerals to be covered by the Enabling Act's restrictions.

In 1936, Congress changed the Enabling Act's general authorization of five year leases to specifically allow for twenty year mineral leases and ten year grazing and agricultural leases. Act of June 5, 1936, Ch. 517, 49 Stat. 1477. In expressly providing for mineral leases within the text of the Enabling Act itself, Congress plainly evidenced its belief that minerals were part of the trust corpus and subject to the very same restrictions as other trust assets. The amendment made no distinction between minerals that passed to the trust under the original Enabling Act and those that passed under the Jones Act: it simply referred to all of them as "minerals" and treated them as part of the same trust. If, as the mines claim, Congress had intended both of these classes of minerals to be completely free of trust restrictions, there would have been no reason to address mineral leases in the Act at all. Moreover, if minerals had been free of trust

restrictions from the beginning, there would have been no need to "liberalize" the permissible term for mineral leases. Clearly, Congress thought that minerals were part of the trust and subject to the original five year leasing restriction when it decided to extend the permissible term to twenty years in the 1936 amendment.

The mines assert that the Jones Act addressed only school sections known to be mineral at survey, and that the 1936 amendment was intended to fill a "gap" by addressing sections with after-discovered minerals. But neither the Jones Act nor the 1936 amendment made any distinction whatsoever in the treatment of these two classes of lands. Indeed, the whole purpose of the Jones Act was to end once and for all the differential treatment of known and after-discovered mineral lands, and to extend the original school grants "to embrace mineral as well as non-mineral sections of land." H.R. Rep. No. 1761, *supra*, at 2. Congress specifically wanted to spare the states from any further litigation over whether lands were or were not known to be mineral in character at the time of the original grants. See S. Rep. No. 603, *supra*, at 1-2. Accordingly, it directed that the grant of mineral lands be "of the same effect" as the prior grants. There was therefore no need for Congress in 1936 to fill any "gap" in the treatment of these lands: after the 1927 Act, they had all been incorporated into the various school land grants and were all subject to the respective trust restrictions.

If, as the mines assert, the Jones Act constitutes the only restriction on disposal of school sections known to be mineral at survey and the 1936 amendment governs only after-discovered sections, then the differential treatment of these lands would continue to this day. Because the Jones Act prohibits the sale of mineral rights but allows leasing for an unspecified duration, the state could presumably lease "Jones Act" mineral lands for unlimited terms, but not sell the mineral rights. Because the 1936 amendment restricts lease terms to twenty years but contains no prohibition on sale, then the "after-discovered" mineral lands could be sold outright, but leased for only twenty years. Manifestly, Con-

gress could not possibly have intended to create such a labyrinthine mineral leasing system in Arizona or any other state. The various acts are most logically and sensibly read together as producing one mineral leasing regime that is subject to the specific restrictions in the Enabling Act.³⁴

Contrary to the mines' assertions, there is nothing in the language of the 1936 amendment or its history to suggest that Congress intended to liberalize anything other than the allowable duration of mineral leases. The Act did not in any way exempt such leases from the appraisal requirement, and in fact *eliminated* the pre-existing exemption of leases from the advertisement requirement. Likewise, the portion of the Senate Report cited by the mines supported the removal of trust restrictions only "to the extent proposed by the bill": it did not by any means express a general intent to abandon all restrictions. S. Rep. No. 1939, *supra*, at 3.³⁵ Finally, the 1936 amendment was not, as the mines speculate, an "endorsement" of a supposed "practice" by Arizona of not appraising mineral leases. There is no evidence in the record as to whether the Land Commissioner was or was not appraising mineral leases in 1936, nor does the legislative

³⁴ The mines misleadingly "quote" the Senate Report as stating that neither the original Enabling Act nor the Jones Act addressed the leasing of after-discovered mineral deposits. Pet. Br. at 37, *citing* S. Rep. No. 1939, 74th Cong., 2d Sess. 2 (1936). In reality, the referenced statement came not from the committee, but from a letter reproduced in the report from the then acting Interior Secretary. Moreover, the statement was wholly gratuitous, as it was not tied to any specific provisions in the bill and was in fact totally unrelated to the bill's purpose. Accordingly, it is entitled to little weight. See generally *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980); *Regan v. Wald*, 468 U.S. 222, 237 (1984).

³⁵ In addition to extending the permissible duration of leases, the 1936 amendment also eliminated a prohibition on the sale of trust lands for less than \$3 per acre, and added a clause expressly authorizing the exchange of trust lands for other lands. Act of June 5, 1936, ch. 517, 49 Stat. 1477. References in the Senate Report to liberalization of provisions and restrictions were referring to these specific changes, along with the extension of permissible lease duration, and not to any intent to remove *other* trust restrictions.

history show that Congress was at all aware of the Commissioner's practices in this regard.

The 1951 amendment to the Arizona Enabling Act confirmed that Congress had intended all along that mineral leases be subject to the appraisal and true value requirements. There was no evidence of any concern in that statute for the two classes of mineral lands imagined by the mines. Rather, Congress treated all mineral leases as being subject to the same trust, and exempted only oil and gas leases from the appraisal and true value requirements.

4. Other laws have provided for appraisal of mineral lands.

The mines incorrectly imply that Congress has some sort of longstanding policy against providing for the prior appraisal of mineral interests. In 1918 — only eight years after Arizona's admission — Congress passed a statute requiring appraisal prior to sale of coal and asphalt deposits in the Choctaw and Chickasaw Indian Reservations. Act of Feb. 8, 1918, ch. 12, §4, 40 Stat. 433. The statute required the Secretary of Interior to offer the mineral rights at public auction at not less than the appraised price. *Id.* Likewise, the Federal Coal Leasing Amendments Act of 1976 requires competitive bidding for federal coal leases, with no bids to be accepted at less than "the fair market value, as determined by the Secretary." 30 U.S.C. §201. And the Department of Interior conducts what is in effect an appraisal in determining whether mineral lands selected by states in lieu of certain school sections (e.g., sections that fall within federal reservations) are similar in value to those school sections. *See Andrus v. Utah*, 446 U.S. 500, 503-504 (1980).

The 1920 Mineral Leasing Act, relied upon by the mines, does not suggest Congressional rejection of appraisals. To the contrary, the Act gives discretion to the Secretary of Interior to determine and set lease terms. *See* 30 U.S.C. §187. And even under the 1872 mining law, the Secretary must evaluate the worth of a mining claim before he can determine whether a "discovery" of valuable mineral depos-

its has occurred. *See, e.g., United States v. Coleman*, 390 U.S. 599 (1968). *See generally* J. Leshy, *The Mining Law 158-66 (1987)* (hereinafter, "Leshy").

In any event, the mines' efforts to construe the Arizona Enabling Act based on completely unrelated mining statutes are totally inappropriate. The basic purpose of the Arizona Enabling Act — to provide a trust for the benefit of the public schools — is fundamentally different from that of either the 1872 mining law or the 1920 Mineral Leasing Act, which was not primarily to generate revenue for public purposes but to promote mineral exploration and development. *See, e.g., Leshy at 17, 166.* Given Congress' unmistakable intent that Arizona's schools should receive the "full benefit" of the school land grants, application of the appraisal and true value requirements to mineral leases makes perfect sense.

III. MINERAL LEASES ARE FULLY SUBJECT TO BASIC TRUST RESTRICTIONS THAT PROHIBIT MAXIMUM PRICES AND THE GIVEAWAY OF TRUST ASSETS.

In their zeal to escape the Enabling Act's specific appraisal and true value requirements, the mines completely ignore the other basic trust duties imposed by the Act. Even if there were no appraisal and true value requirements, the state would still be under a fiduciary duty to maximize returns from trust lands and to prevent the loss of trust assets. Arizona's mineral royalty statute unquestionably violates both of these duties, by forcing the state Land Commissioner to dispose of all trust minerals at one of the lowest royalty rates in the nation, and by forcing him in some instances to literally give away trust minerals.

The mines do not seriously dispute that minerals are part of a trust corpus, but they assert that the courts must defer to the Arizona legislature's judgment in passing the royalty statute. In the management of school trust lands, however, the Arizona legislature is entitled to no more deference than any other trustee. *See, e.g., County of Skamania v. State*,

102 Wash. 2d 127, 132, 685 P.2d 576, 580 (1984). In fact, an even more demanding standard of review is applied with respect to the school land trusts, which must be strictly construed to protect the trust purposes. See *Ervien v. United States*, 251 U.S. 41, 47 (1919) (trust terms of Enabling Act "preclude any license of construction or liberties of inference").³⁶ This is not an area, as the mines seek to imply, of traditional federal court deference to the states such as is observed in construing grant conditions imposed by Congress under the spending power. Pet. Br. at 16, citing *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 25 (1981). The school land grants were made pursuant to Congress' constitutional power under Article IV §3 to provide for the admission of states and the disposition of federal property, a power that this Court has described as being "without limitations." *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952). The rule of construction with respect to federal land grants is unambiguous: such grants are to be "construed strictly in favor of the public," and nothing passes except what is granted in clear and explicit terms. *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892).

Judicial willingness to rigorously enforce the school land trusts is dramatically illustrated by the numerous court decisions in which state actions have been invalidated for illegally limiting returns to the school trust funds.³⁷ Significantly, most of these decisions were made under constitutions and enabling acts that do not contain the specific appraisal and true value requirements that appear in the Arizona Enabling Act. The courts in these cases plainly decided that, under basic principles of trust law, the school land trust prohibited states from limiting potential returns from

trust lands. Thus, above and beyond the appraisal and true value requirements, Arizona's mineral royalty statute constitutes a flagrant breach of trust.

CONCLUSION

For the reasons stated above, the decision of the Arizona Supreme Court should be affirmed.

Respectfully submitted,

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³⁶ See also *United States v. New Mexico*, 536 F.2d 1324, 1327 (10th Cir. 1976) (school land grant must be given "narrow interpretation"); *Texas Pacific Coal & Oil Co. v. State*, 125 Mont. 258, 263, 234 P.2d 452, 454 (1951) (Enabling Act to be construed "strictly").

³⁷ See cases cited in notes 12 and 13, *supra*.

FOR ARGUMENT

No. 87-1661

(18) Supreme Court, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION,
MAGMA COPPER COMPANY, and JAMES P.L. SULLIVAN,
Petitioners,
v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Arizona

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IN THE
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ASARCO INCORPORATED, CAN-AM CORPORATION,
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Petitioners,
v.

FRANK and LORAIN KADISH, *et al.*,
Respondents.

On Writ of Certiorari to the
Supreme Court of the State of Arizona

REPLY BRIEF FOR PETITIONERS¹

Since 1941, Arizona's mineral leasing statute challenged here has provided for a five percent royalty on the net value of minerals extracted from school lands owned by the state. That statute was enacted pursuant to the authority expressly conferred on the state legislature by the Jones Act of 1927 in which Congress, in granting mineral lands to western states, provided that the minerals therein should be "subject to lease by the State as the State legislature may direct," and by the 1936 amendment to the Enabling Act of 1910 in which Congress similarly authorized the Arizona legislature to lease minerals in school lands that passed under that act.

The court below held that the state's authority pursuant to these federal acts extends only to the mechanics of mineral leasing. It held that the dispositional restric-

¹ The listings required by Rule 28.1 of the Rules of this Court are at page ii of the Petition for Certiorari and page ii of the Opening Brief for Petitioners.

tions set forth in the original Enabling Act govern mineral leasing and that, accordingly, the Arizona statute is invalid because it does not provide for leasing on the basis of prior appraisal as required by the 1910 act.

In this reply brief we demonstrate the errors in the arguments supporting the decision below made by respondents and the Solicitor General as *amicus curiae* on their side. We also show that the decision below cannot be sustained on "basic trust principles" as respondents, with the apparent support of eleven western states as *amici curiae*, contend. Then we address the suggestions that the Court should not decide this case on the merits. Contrary to those suggestions, respondents have interests that satisfy the standing requirement of Article III; the decision below is final within the meaning of the Court's jurisdictional statute, and the federal question is substantial despite speculation that the Arizona Supreme Court might at some time in the future hold that appraisal prior to leasing is required by the Arizona Constitution.

ARGUMENT

I. THE JONES ACT AND THE ENABLING ACT CONFER THE MINERAL LEASING AUTHORITY EXERCISED BY THE ARIZONA LEGISLATURE.

A. The Jones Act.

By the Jones Act of 1927 Congress granted to the western states the mineral-bearing lands that had been withheld by their respective enabling or admission acts. Since the Arizona statute challenged here governs mineral leases in public lands, this case concerns, first of all, the meaning of the Jones Act. That act prohibited the sale of newly granted mineral-bearing sections but made the mineral deposits "subject to lease by the State as the State legislature may direct." 44 Stat. 1026 (Pet. Br. 1a).

Congress said in Section 1(a) of the Jones Act that the grant of the mineral-bearing sections "shall be of the same effect as prior grants for the numbered nonmineral

sections, and titles . . . shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections." Respondents and the Solicitor General, who try to play down the significance of the Jones Act, stake their all on the phrase "of the same effect" when they finally do confront the act. (See Resp. Br. 30-31; Sol. Gen. Br. 27.) They (and the court below) say that by use of those words Congress made leasing of mineral deposits in the newly granted mineral lands subject to all the various dispositional restrictions of the enabling and admission acts, including, in the case of Arizona, Section 28 of the New Mexico-Arizona Enabling Act, most restrictive of all. For two overriding reasons, those words will not bear such a heavy load.

First, it is the "grant of numbered mineral sections" that is declared by Section 1(a) to be "of the same effect as prior grants for the numbered nonmineral sections," not the restrictions on the states' disposition of the lands granted. (Emphasis added.) Restrictions on disposition are stated in the following Section 1(b). One of these clearly is not "of the same effect" as any of the restrictions in the relevant admission and enabling acts. The requirement that if the states sell any of the mineral-bearing sections newly granted they must reserve the mineral rights has no counterpart in any of the enabling acts of the western states affected by the Jones Act.² Other exploitable products of the land, such as timber, could be sold under the original grants.³ In contrast, in the one all-important respect in which Congress wanted to be sure that the restrictions in the Jones Act were "of

² Congress had earlier granted to Oklahoma, uniquely among the western states, mineral lands upon statehood and prohibited it for the first five years of statehood from selling such lands but allowed leasing. Oklahoma Enabling Act, ch. 3335, § 8, 34 Stat. 267, 273-74 (1906). Oklahoma was not affected by the Jones Act. (See Pet. Br. 26 n.24.)

³ See New Mexico-Arizona Enabling Act, § 28, allowing sale "of any timber or other natural product" of the granted lands. (Pet. Br. 5a.)

the same effect" as those in the enabling acts, it specified in Section 1(b) that the proceeds from leases of mineral rights were "to be utilized for the support or in aid of the common or public schools." On the view of respondents and the Solicitor General, Congress, having said one thing in subsection (a) of Section 1 of the Jones Act ("of the same effect"), proceeded both to contradict itself (no sales of mineral rights) and to repeat itself (proceeds to be used for the public schools) in subsection (b). That is not credible.

Second, the way respondents and the Solicitor General read the Jones Act leaves no meaning—none—for the authorizing phrase "as the State legislature may direct." Respondents do not even try to grapple with the presence of this phrase in the Jones Act. The Solicitor General refers only to what the court below said—that the phrase merely meant to give the state legislature "power to regulate the overall manner of the making of the lease, and the general terms of the lease, so long as there is substantial conformity to the restrictions of § 28." (Sol. Gen. Br. 27, 23.) But that cannot rationally be. Taking Arizona as an example, it had the power under Section 28 of the 1910 Enabling Act to sell and lease the non-mineral lands that were granted by that act, subject to the requirements of advertising, auction, and prior appraisal. Congress had not thought it necessary to include in Section 28 as it was enacted in 1910 the obvious point that it would be the state lawmaking body that would determine the overall manner of making the permitted leases and sales. Yet surely the Arizona legislature had that power. And it would just as surely have had the power to prescribe the mechanics of leasing mineral deposits if in the Jones Act Congress had not said "as the State legislature may direct." As is more fully developed in our discussion of a similar phrase in the amended Section 28 of the Enabling Act, p. 8 below, Congress has used just such an expression of authority to make clear that states are free from some or all federal dispositional restrictions.

Given the all-but-unmistakable meaning the words of the Jones Act convey, it scarcely matters whether Secretary of the Interior Work's authoritative draftsman's explanation of subsection (a) excludes the expansive reading of the "same effect" clause that is essential to the holding of the court below (*see Resp. Br. 31 n.29; Sol. Gen. Br. 27 n. 20*), though his explanation does exclude that reading and committee and floor sponsor comments on his bill nail down the exclusion.⁴

Nor does respondents' law Latin (Br. 32) advance analysis. Of course, the Jones Act is related to the New Mexico-Arizona Enabling Act and the enabling acts of the other western states—*in pari materia* if you will. But surely, if that related piece of legislation expresses a policy that diverges from that of the enabling acts, the expressed policy must be given effect. The new policy of deference to state legislative judgment in mineral leasing appears on the face of the Jones Act as well as in the remarks of sponsors such as Congressman Sinnott (Pet. Br. 30).

B. The Amended Enabling Act.

The original New Mexico-Arizona Enabling Act of 1910 did not deal purposefully with the leasing of mineral deposits because known mineral lands were withheld from numbered sections granted to the states.⁵ Accord-

⁴ See Pet. Br. 33. The Secretary may very well have used the "same effect" phrase out of concern that there were incidents of grants of federal public lands other than the time at which and manner in which title would vest that should be provided for in carefully drawn legislation. Neither in his letter explaining his revised bill nor elsewhere in the House committee report where the letter is published is there a suggestion that states were to be bound by all the restrictions of their enabling or admission acts in leasing the deposits in the newly granted mineral lands. H.R. Rep. No. 1761, 69th Cong., 2d Sess. (1927). The House, debating the bill, was told by Congressman Winter, a proponent, that Secretary Work's revised bill was "in substance the same" as the original House substitute, 68 Cong. Rec. 2581 (1927), which did not contain the "same effect" language or anything like it.

⁵ This Court had decided in 1898 in *Shaw v. Kellogg*, 170 U.S. 312, 331 (Resp. Br. 27 n.24), that a subsequent discovery of min-

ingly, Arizona and New Mexico authorized mineral deposits to be leased without the nearly impossible prior appraisal and without the advertising and auction that would discourage the prospecting that would bring about discovery of minerals in the first place. (Pet. Br. 24-25.) The New Mexico Supreme Court agreed with its legislature that the dispositional restrictions in the New Mexico-Arizona Enabling Act had no application to mineral leases and upheld the legislature's mineral leasing statute on that ground. *See Neel v. Barker*, 204 P. 205 (N.M. 1922). Congress in 1928 confirmed the New Mexico view by authorizing New Mexico to amend its constitution, which was bound to conform to the Enabling Act,⁶ to permit it to lease minerals on such terms "as may be provided by" the New Mexico legislature. (Pet. Br. 25.)

Arizona's turn came in 1936 when Congress amended Section 28 of the Enabling Act to provide that Arizona could lease mineral lands for terms of up to twenty years "in a manner as the State legislature may direct." By this action, Congress gave Arizona the same mineral leasing authority it had accorded New Mexico in 1928. The Senate and House committee reports, which are nearly identical, make it eminently clear that Congress intended that Arizona have broad authority to lease later-discovered mineral lands that had passed to the state under the Enabling Act and were not governed by the Jones Act.⁷

erals would not operate to revoke title that had passed to private persons under a federal grant intended "finally [and] speedily" to resolve certain claims under earlier grants by Mexico. There is no basis for even suggesting that Congress had this obscure and very particular precedent in mind when it specifically withheld mineral land from Arizona and New Mexico and therefore meant to deal with later-discovered minerals.

⁶ See §§ 2, 10, 36 Stat. 560, 563.

⁷ S. Rep. No. 1939, 74th Cong., 2d Sess. 1-3 (1936); H.R. Rep. No. 2615, 74th Cong., 2d Sess. 1-3 (1936). It is no derogation of this legislative history that the supporting statements are in Cabinet officers' letters to the committees (Resp. Br. 37 n.34). Both com-

The reasons offered by the proponents of the decision below for not giving the apparent intended scope to the phrase "in a manner as the State legislature may direct" in the 1936 amendment to the Enabling Act are as empty as those offered for denying effect to the comparable provision of the Jones Act.

There is first the extravagant contention of respondents that the natural reading of the phrase "would literally eviscerate the school land trusts throughout the West." (Br. 23.) Beneath the hyperbole, that seems to be a contention that Congress has used the same or similar phrase in enabling and admission acts to permit states to provide for the ministerial details of mineral leasing but has not used such language to authorize states to make mineral leasing policy. (*Id.* at 23-24 & n.20.) That is not the case. In the first place, the only previous western enabling act that granted mineral lands was Oklahoma's, and in that one, as we have pointed out (Pet. Br. 21), Congress was careful to empower the state legislature only to prescribe "additional" legislation governing mineral leases "not in conflict" with specific federal restrictions that included advertising and sealed bids but not appraisal.⁸ The later grant of mineral lands to Alaska (*see Resp. Br. 24 n.20*) is in nearly the precise terms of the Jones Act, so that the only federal restriction on leases is the requirement that proceeds be used for the public purposes specified in the act.⁹ Unless the provision of that statute that mineral deposits are "subject to lease by the State as the State legislature may direct" empowers Alaska to determine

mittees stated that the "facts concerning the proposed legislation" were in those letters, which the committees expressly "made a part" of their reports.

⁸ 34 Stat. 273-74.

⁹ Alaska Statehood Act, § 6(i), 72 Stat. 339, 342 (1958). The Hawaii Statehood Act, also cited by respondents, does not deal specifically with mineral lands but grants the new state the utmost leeway in managing and disposing of granted lands so long as the proceeds are used for the purposes specified in the act. § 5(f), 73 Stat. 4, 6 (1959).

leasing policy, there is a void because there is no stated federal policy.

As for the statutes in which the phrase is used in respect of matters other than mineral leases, they prove our point, not respondents': the phrase is used concerning transfers of interests in land that clearly are free of restrictions imposed on other such transfers. Thus, the Idaho Admission Act (Resp. Br. 24 n.20) provides that granted lands "shall be disposed of only at public sale" but "may, under such regulations as the legislature shall prescribe, be leased for periods of not more than five years."¹⁰

Then there is the Solicitor General's argument (Br. 22-24), which tries to explain (as respondents do not) the fact that the 1936 amendment begins by saying that "nothing herein contained" shall prevent Arizona from leasing its school lands for mineral purposes for twenty years or less "in a manner as the State legislature may direct." The Solicitor General merely quotes the court below in urging that the latter words encompass only the power "to regulate the overall manner of the making of the lease" and the "general terms of the lease" while requiring "substantial conformity" to all the restrictions of Section 28. The explanation that the Solicitor General

¹⁰ Ch. 656, § 5, 26 Stat. 215, 216 (1890). The quotation in the text is from the original act, cited by respondents; subsequent amendments lengthened the permissible lease term to ten years for all leases and then to the period of production for oil and gas leases, 56 Stat. 48 (1942); 63 Stat. 714 (1949). See also Wyoming Admission Act, as amended, ch. 664, § 5, 26 Stat. 222, 223 (1890); 48 Stat. 350 (1934); 63 Stat. 703 (1949), North Dakota, South Dakota, Montana and Washington Admission Act, as enacted and cited by respondents, ch. 180, § 11, 25 Stat. 676, 679 (1889). Cf. id., as amended, 47 Stat. 150 (1932); 52 Stat. 1198 (1938); 62 Stat. 170 (1948); 81 Stat. 106 (1967) ("Except as otherwise provided herein, the said lands may be leased under such regulations as the legislature may prescribe."). The Oklahoma Enabling Act, ch. 3335, § 8, 34 Stat. 267, 273 (1906), uses the phrase "as the legislature may prescribe" to authorize the state to apportion and dispose of a numbered school section previously reserved for a certain purpose and now free of the reservation.

adopts denies effect both to "nothing herein contained" and to "as the State legislature may direct."

Ever since 1910, under the specific terms of the second sentence of the third paragraph of Section 28, Arizona had the power to lease the nonmineral school lands granted by that act for any period of time so long as there was substantial conformity with the requirements contained in Section 28. (Pet. Br. 9a-10a.)¹¹ Thus the Arizona legislature must have had the inherent power to regulate the "overall manner of the making" of the authorized sales and leases and their "general terms" without Congress having to say so. Unless the legislature had that power, nobody did and there could be no leases, or sales for that matter.

The 1936 amendment had to mean some different treatment of twenty-year mineral leases or Congress would not have bothered. But the court below and the Solicitor General say, to the contrary, that *everything* "herein contained," every restriction set forth in Section 28, still applies to such leases, and the legislature has no more power over them than it necessarily had over unlimited-term leases under the 1910 act.

The Solicitor General is willing to retreat one step if forced to it. Maybe, he says, the phrase "nothing herein contained" can be read to eliminate the advertisement requirement of the third paragraph of Section 28. This is because the 1936 amendment took the form of an enlargement of an original proviso in the 1910 version of the third paragraph of Section 28 allowing five-year leases without advertisement. But in 1936 Congress did not just repeat for twenty-year mineral leases what it had said about five-year leases in 1910. It kept "nothing

¹¹ Sales and leases of school lands are authorized in identical terms by the second sentence of the third paragraph, and the fourth paragraph speaks of "leaseholds" being offered. There is for this reason nothing to respondents' murky suggestion (Br. 20-21), that "nothing herein contained" was necessary to free short-term leases from the ban on encumbrances stated in the first sentence of the third paragraph of Section 28.

herein contained" (which in the context of the Enabling Act reached as far as it could (Pet. Br. 21)) and in addition, just as expansively, said substantially what it had said nine years before in the Jones Act when it made state legislatures responsible for leases of known mineral deposits: "in a manner as the State legislature may direct." The intention to free twenty-year mineral leases from all the restrictions of Section 28 is plain.

In the end, the proponents of the decision below lay their heaviest emphasis on the 1951 amendment to the Enabling Act. That emphasis is misplaced. To begin with, all that Congress did in 1951 with respect to non-hydrocarbon mineral leases (covered by the Arizona statute challenged here) was to make clear that they could be combined with grazing and agricultural leases and to change slightly the wording of the conferral of authority on the legislature. The 1951 amendment continued the policy that animated the Jones Act and the 1936 amendment: "nothing herein contained" was to prevent "the leasing of any of the said lands, in such manner as the Legislature of the State of Arizona may prescribe" for mineral purposes. The proponents, however, seize on language Congress used to describe the state legislature's power over the leasing of hydrocarbon minerals, which Congress in 1951 made subject to a somewhat different leasing regime that is not an issue in this case.

The language they rely upon provides that the state legislature may determine the manner of leasing hydrocarbon minerals "with or without advertisement, bidding, or appraisement." That language makes clear that the new provisions for hydrocarbon leasing, which extended the permissible duration of leases from twenty years to as long as production continues and which set a minimum royalty of twelve and one half percent, would not affect the freedom already enjoyed by the state legislature to use or not to use appraisal or public sale procedures. No significant change was made in the legislature's leasing authority with respect to nonhydrocarbon leases and, accordingly, no such clarifying language was necessary.

The legislative history of the 1951 amendment confirms that Congress intended to continue to relieve Arizona of federal restrictions on the manner of leasing state-owned mineral lands. The Senate committee was convinced that the legislature of Arizona "is able and is to be trusted to safeguard the interest of all of its citizens in the leasing of its State lands, as the legislatures of sister States have been trusted to the benefit of the citizens of the State and the Nation." S. Rep. No. 194, 82d Cong., 1st Sess. 2 (1951). The committee report states that the amendment was intended to place Arizona on an "equal footing with the greater number of her sister States," noting, among others, New Mexico, where "there are no Federal restrictions on the terms and manner of issuing . . . mineral leases, including those for oil and gas." *Id.* at 2, 3.¹²

Under the Enabling Act of 1910, Arizona had full authority over the ministerial details of all manner of leases of school lands. It enjoyed that authority by reason of its sovereignty and not by reason of any delegation of authority by Congress; there was none. To contend that the specific delegations of authority to lease minerals that Congress made to Arizona in 1927 and 1936 and reaffirmed in 1951 merely had the effect of giving the state dominion over ministerial details, which the state already enjoyed, is to assert that these delegations lacked all substance. There was substance. Pursuant to these acts, for almost fifty years Arizona has leased mineral lands as its legislature prescribed and without prior appraisal, and at no time has the Attorney General of the United States challenged that practice even though he is expressly given the duty of enforcing the provisions of both the Enabling Act and the Jones Act. See 36 Stat. 575; 44 Stat. 1027.

¹² Respondents' claim (Br. 20) that an advertisement requirement governs mineral leasing under the enabling acts of those sister states is flatly wrong, *see, e.g.*, Wyoming Admission Act, as amended, ch. 664, § 5, 26 Stat. 222, 223 (1890); 48 Stat. 350 (1934); 63 Stat. 703 (1949); Idaho Admission Act, as amended, ch. 656, § 5, 26 Stat. 215, 216 (1890); 56 Stat. 48 (1942); 63 Stat. 714 (1949).

II. THE DECISION BELOW CANNOT BE SUSTAINED BY RESORT TO BASIC TRUST PRINCIPLES.

The second paragraph of Section 28 of the Enabling Act says that “[d]isposition of” any of the granted lands “in any manner contrary to the provisions of this Act . . . shall be deemed a breach of trust.” (Pet. Br. 4a-5a.) To that extent, there is an issue of breach of trust in the case. It is congruent with and adds nothing to the issue of statutory construction.

Respondents, however, make a separate breach of trust argument that is not in the case. They seek to support the decision of the court below on the basis of “basic principles of trust law,” not otherwise specified. (Resp. Br. 40.) A brief *amici curiae* filed on behalf of eleven western states may be directed to this same contention.

Trust principles may govern the administration by Arizona of all school lands, mineral and nonmineral, granted to it by the federal government. While the Jones Act does not on its face convey lands in trust, its requirement that rental proceeds be used for the public schools might be read as imposing trust obligations. *See Papasan v. Allain*, 478 U.S. 265, 289 n.18 (1986). In any event, petitioners do not claim that the Jones Act repealed the state’s trust responsibilities (*see States Br. 1*). But the decision below does not rest upon trust principles apart from the finding that the specific terms of Section 28 of the federal Enabling Act were violated; no findings of other trust violation were made or could have been made; and the court’s decision, based on cross-motions for summary judgment without findings of fact, considered only the question of statutory interpretation.

Indeed, in reaching its decision, the court below observed that Arizona’s royalty statute would still be invalid “even if the overall effect of [the Arizona leasing statute] encouraged greater production so that lessees pay higher royalties to the state than would be paid on a fair value basis.” (Pet. 25a.) Thus, the court below did not hold, and could not have held on the record before it,

that, apart from its inconsistency with the fourth paragraph of Section 28 of the Enabling Act, the Arizona statute was, as respondents urge, a breach of trust (Resp. Br. 41).

All stops are pulled in the chorus of invective directed by respondents and eleven states at Arizona’s mineral leasing statute with its royalty rate of a flat five percent of net value. It would be easy to forget in the reading of the invective that there is no inherent inconsistency between a flat percentage royalty rate applied to a market-based value and maximization of revenues. It is a characteristic of percentages that what they produce varies with the value of what they are applied to. Five percent of the value of a pound of gold is a lot more than five percent of the value of a pound of lead. There is no such “ceiling” as respondents and the states suggest on what Arizona will receive from highly productive mining of a valuable mineral.

This Court need not decide, or even be concerned with, whether Idaho’s minimum royalty on leases of two and one half percent (States Br. 15) or Colorado’s range of royalties from four to seven percent (*Id.* at 12) would produce more revenues for Arizona than a five percent royalty. That is a matter for decision by the Arizona legislature, acting on behalf of its citizenry, as Congress provided.

III. THIS CASE IS PROPERLY BEFORE THE COURT.

A. Standing.

Contrary to the contention of the Solicitor General (Br. 14-18), respondents, who prevailed as plaintiffs below, have a sufficient interest in the subject matter of this action to create a case or controversy within the meaning of Article III.

One of those respondents is the Arizona Education Association, which asserts the interests of its members, who are 20,000 Arizona public school teachers. The Association alleged that the failure of Arizona officials to base

mineral leases on appraised value "imposes an adverse economic impact on the Association and its members" and adversely affects the "quality of education in Arizona." (See Sol. Gen. Br. 17-18 & n.11.) Given the uncontested dependence of the Arizona public schools and their teachers on the proceeds of the school trust lands, that is an allegation of injury in fact that qualifies the teachers for standing under Article III. The teachers have an unquestioned personal economic interest in the level of their salaries, and the harm they suffer in the pursuit of their profession from crowded classrooms and lack of books and computers is at least as individual and particular to them as the harm resulting from the discarding of recyclable goods in the parks near Washington to the young plaintiffs in *United States v. SCRAP*, 412 U.S. 669, 686-90 (1973).¹³ Teachers are uniquely affected by the myriad ingredients that determine the "quality of education" and depend largely on money, and they suffer uniquely when those ingredients are wanting.

The Solicitor General asserts, however, that the Association cannot allege with sufficient certainty that the relief it seeks—invalidation of the state's leasing statute—will necessarily result in an increase in public school teachers' salaries; he does not deign even to consider whether the "quality of education" may improve. Under federal standing law, however, a fair or reasonable likelihood of redress is enough; certainty is not required. In *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980), litigants were held to have standing though they "could not with certainty establish" that they would realize the benefits they sought if they obtained the legal relief they were seeking, *id.* at 367. An infusion of public school revenues is highly likely to result in higher teacher salaries, improved classroom conditions or both. The teach-

¹³ See also *Pennell v. City of San Jose*, 108 S. Ct. 849, 855 (1988); *Japan Whaling Ass'n v. American Cetacean Society*, 478 U.S. 221, 230 n.4 (1986); *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

ers were not bound to anticipate and refute, as the Solicitor General suggests, other possibilities such as that the increase in leasing revenues from school lands would be offset by diversion of existing tax funds from the support of the public schools. See *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 77-78 (1978).

Should there be such a diversion, it would in any event be to the benefit of the other plaintiff-respondents, three named Arizona taxpayers.¹⁴ They alleged in the complaint that the Arizona mineral leasing royalty statute has "deprived the school trust funds of millions of dollars thereby resulting in unnecessarily higher taxes." Their grievance thus concerns "a direct dollars-and-cents injury," *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952), and their lawsuit therefore meets the test for a case or controversy under Article III indicated in that case: that it be "a good-faith pocketbook action," *id.* In these circumstances, it is quite beside the point that, as the Solicitor General says, "this Court has consistently held that a person does not satisfy the standing requirement of Article III based on nothing more than his status as a citizen or taxpayer who is interested in the conduct of his government" (Sol. Gen. Br. 15). The respondent-taxpayers' interest is not merely that of citizens interested in good government. The Court has never disavowed the distinction drawn in *Doremus* between taxpayers motivated by a "pocketbook" concern who had standing to litigate an Article III case or controversy in *Everson v. Board of Education*, 330 U.S. 1 (1947), and those motivated by "a religious difference" in *Doremus* who did not.¹⁵

¹⁴ Section 28 of the Enabling Act (Pet. Br. 8a) specifically recognizes the interest of Arizona citizens in enforcing the dispositional provisions of the act. 36 Stat. 575.

¹⁵ Two of the petitioners did, as the Solicitor General points out (Sol. Gen. Br. 15-16, 17 n.10), question in the trial court whether by Arizona standards the teachers and the taxpayer-plaintiffs had

Should the Court nonetheless conclude that respondents lack standing to maintain this action, petitioners submit that the proper course would be to vacate the judgment of the Arizona Supreme Court. *Cf. DeFunis v. Odegaard*, 416 U.S. 313, 320 (1974). It should not leave in effect a state court's decision of a federal question that cannot be reviewed here because of a defect in the prevailing party's standing, as the Solicitor General urges, though that is the suggestion of *Doremus*, 342 U.S. at 434; *see also City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243 (1983).

A significant element of the suggestion in *Doremus* was the Court's indication that it would not treat the decision of the underlying federal issue as binding on it if the nonprevailing party could somehow secure a decision in a second case that satisfied Article III. 342 U.S. at 434. But in this case there is little chance that petitioners could secure a second decision that this Court would want to exercise its discretion to review. If the Court were to dismiss the present petition, the Arizona legislature would be confronted by a decision of its highest court, binding on it, that one of its statutes is invalid. The legislature will very likely believe that the responsible course is to write substitute legislation that is valid under that decision, eliminating any opportunity for review of an important question of federal law.

B. Finality.

The Solicitor General argues that the judgment of the Arizona Supreme Court is not sufficiently final to give this Court jurisdiction under 28 U.S.C. § 1257(3). Specifically, he says that it remains to be determined whether petitioners' present mineral leases are void because "not

the requisite interest to maintain this suit. But, as the superior court implicitly held in rejecting that argument, Arizona law does not require a plaintiff to be able to prove conclusively that the injury he claims to be suffering would be redressed by the relief he seeks. No more, as we have shown, does the federal law of Article III standing.

made in substantial conformity" with the Enabling Act. (Br. 11.) But the validity of those leases is not within the issues that have to be (or can be) determined in this lawsuit. What does remain to be done on remand is fully consistent with this Court's description of the "additional proceedings anticipated in the lower state courts" that do not deprive a state appellate court's final decision on a federal issue of the finality requisite to review here. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975).

In their complaint respondents, in addition to costs and attorneys' fees and the usual "other and further relief," asked for (1) a declaratory judgment that the Arizona mineral lease royalty statute violated the Enabling Act and the Arizona Constitution, (2) an injunction against *further* leases in violation of the Enabling Act and the Arizona Constitution, and (3) an accounting of sums due (under the existing leases) and an order directing that such sums be paid. (See J.A. 1, item 1.)

Respondents moved for partial summary judgment on their first prayer only.¹⁶ The limited scope of respondents' lawsuit was confirmed in their brief on appeal. They said that they had dropped their request for an accounting, and the prayer of the brief was for reversal of the trial court's judgment and entry of an order (1) declaring the royalty statute void for violation of the Enabling Act and the Arizona Constitution and (2) remanding the case "for further appropriate proceedings, including entry of a permanent injunction prohibiting the defendants [state officials] from entering into fur-

¹⁶ Although, in denying their motion and granting petitioners' motions for summary judgment dismissing the complaint, the trial court said that "[p]laintiffs claim that the various mineral leases held by the Intervenors of State trust lands are void" (Pet. 38a), nothing in the record suggests that any such claim was before the trial court on the cross motions or on the pleadings generally, and it surely was not decided.

ther lease agreements in violation of the Enabling Act and the Arizona Constitution." (See J.A. 10, item 11/29/85, at 6 n.3, 40.)

The Arizona Supreme Court's order of reversal and remand (Pet. 29a) is consistent with respondents' prayer despite the effort of the Solicitor General (Br. 11), built on out-of-context bits from here and there in the court's opinion, to make it appear that the court directed the trial court to consider on the remand whether to grant relief respondents had not requested by declaring existing mineral leases void. The court gave no such direction.

It will be appropriate, on the pleadings, for the trial court on the remand to consider entering an order in the nature of mandamus or prohibition (for which the Arizona "special action relief" referred to in the remand order is a substitute (see Pet. 3a n.2)) directing the defendant state officials not to make further leases under the invalidated statutes; such an order, indeed, seems inevitably to follow from the supreme court's decision. It will not be appropriate, on the pleadings, to adjudicate whether existing leases are void. The prohibition of future leases is either ministerial or preordained and thus falls within the *Cox Broadcasting* categories of cases in which state court judgments are final even though something remains to be done. Any additional proceedings in this case "would not require the decision of other federal questions that might also require review" by this Court. 420 U.S. at 477; *Duquesne Light Co. v. Barasch*, 109 S. Ct. 606, 615 (1989).

C. The Arizona Constitution.

The State of Arizona through its Attorney General, in a belated appearance as *amicus curiae*, speculates that, given an opportunity, its supreme court might hold some time in the future that Article X of the Arizona Constitution renders the challenged leasing statute invalid whether or not the Enabling Act does. Accordingly, the

state contends that the requirements of the Enabling Act as determined by the court below are "purely academic" and prays that the case be dismissed for lack of a substantial federal question. (Ariz. Br. 5.) The Solicitor General joins in this speculation and suggests that, on that basis, the Court "may wish to decline the question presented." (Sol. Gen. Br. 24 n.18.) Despite their musings as to the possible reach of the Arizona Constitution, neither the state nor the Solicitor General suggests that the decision below rests upon an adequate and independent state ground so as to deprive this Court of jurisdiction. They could not in the light of *Michigan v. Long*, 463 U.S. 1032, 1037-44 (1983).

Article X of the Arizona Constitution was not overlooked by the court below. It was in this case from the time the complaint was filed. At no time was it suggested that it had any meaning other than that found in the Enabling Act of 1910, as amended, of which Article X is a rescript. In passing the Enabling Act, Congress required Arizona to adopt in its constitution the terms of that act governing the disposition of land.¹⁷ The court below, in interpreting both the Enabling Act and Article X, treated as the central issue the "intent of Congress with respect to the wording upon which Respondents [these petitioners] rely." (Pet. 13a.) It was its analysis of the intent of Congress that led the court to its conclusion that the Arizona leasing statute violated both the Enabling Act and the Arizona Constitution.

The basis for the suggestion that Article X of the Constitution limits Arizona's mineral leasing authority in any way that the Enabling Act does not is a decision of the Arizona Supreme Court that involved neither leases nor mineral lands. *Deer Valley Unified School District*

¹⁷ The terms of and conditions on disposition of land in the Enabling Act of 1910 and in its obligatory rescript, Article X of the Arizona Constitution, are intended to be congruent. See § 20, 36 Stat. 570-71; Ariz. Const. art. X, § 1; *id.*, art. XX, §§ 12-13.

No. 97 v. Superior Court, 760 P.2d 537 (Ariz. 1988). In that case the court held that, even though the Enabling Act did not require advertising and auction upon condemnation of state lands, Article X of the Arizona Constitution did.

The Arizona Supreme Court had the opportunity in this case to determine whether there is similarly something in the Arizona Constitution that is not in the Enabling Act that limits the state's authority to lease minerals on federally granted lands. It made no such determination. What that court might determine in this respect, should it at some time in the future be called upon to do so, is sheer speculation.

CONCLUSION

The judgment of the Supreme Court of the State of Arizona should be reversed.

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No. 87-1661

In the Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, ET AL., PETITIONERS

v.

FRANK AND LORAIN KADISH, ET AL.

**ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT**

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING RESPONDENTS**

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QUESTION PRESENTED

Whether Section 28 of the New Mexico-Arizona Enabling Act (Act of June 20, 1910, ch. 310, 36 Stat. 557) prohibits the leasing of mineral lands held in trust for the benefit of the state's public schools at less than the appraised true value of the lease.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

The question presented is whether Congress, by Section 28 of the New Mexico-Arizona Enabling Act, Act of June 20, 1910, ch. 310, 36 Stat. 557, prohibited the leasing of the mineral lands it granted Arizona, which are held in trust for the benefit of the state's public schools, at less than appraised value. Section 28 expressly provides that the Attorney General is charged with enforcing the Act. Accordingly, the United States has a strong interest in the resolution of the question presented.

In addition, in the submission we made at the Court's invitation prior to the granting of the petition, we noted that, in our view, the plaintiffs do not satisfy the standing requirements of Article III. Under *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952), this Court therefore lacks jurisdiction even though the plaintiffs have standing under state law. The United States also has an interest in the resolution of these recurring questions of Article III jurisprudence.

STATEMENT

1. In the New Mexico-Arizona Enabling Act (Act of June 20, 1910, ch. 310, 36 Stat. 557), Congress granted Arizona certain numbered sections of every township within the State for the support of public schools. Enabling Act § 24, 36 Stat. 572-573. Known mineral lands were specifically excluded from the grant, but Arizona was authorized to select other lands of equal acreage in lieu of those specified sections known to be mineral in character (*ibid.*). By the Act, Arizona received more than eight million acres for the support of its schools. See *Lassen v. Arizona Highway Department*, 385 U.S. 458, 460 n.2 (1967); Pet. App. 4a.

To ensure that Arizona would use the granted lands wisely, Congress provided that the lands were to be held in trust, and set forth explicit terms of the trust in the Enabling Act. *Papasan v. Allain*, 478 U.S. 265, 270 (1986). In Paragraph 3 of Section 28 of the Act, Congress provided that the lands may not be sold or leased except to the highest bidder at a public auction following notice by advertisement in two newspapers once a week for ten weeks. 36 Stat. 574. That paragraph originally provided that only leases for a term of five years or less were exempt from the advertising requirement. Paragraph 4 further provided, and still provides that, before any of the land may be sold or leased, it must be appraised, and the sale or lease "shall [not] be made for a consideration less than the value so ascertained."¹ 36 Stat. 574. Congress directed in Paragraph 8 of Section 28 that a permanent segregated fund must be established for all proceeds and rents derived from the land, and that only the interest from the fund, and not the principal, is to be made available for the support of the schools.² Pet. App. 52a; see 36 Stat. 575.

¹ Paragraph 4 of Section 28 provides, in full: "All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid."

² Arizona has adopted and extended the conditions imposed in the Enabling Act. Article 10 of its Constitution is practically a transcript of Section 28 of the

As noted, the original 1910 grant did not include any known mineral lands. However, under *United States v. Sweet*, 245 U.S. 563, 572-573 (1918), and *Wyoming v. United States*, 255 U.S. 489, 500-501 (1921), unknown mineral lands—*i.e.*, lands containing minerals that were not known to contain minerals at the time of the grant—were conveyed to the State. The distinction that this Court drew between known mineral lands and unknown mineral lands led to numerous land title disputes in many of the western States to which Congress had granted lands to be held in trust for the benefit of public schools. In order to settle such disputes, Congress in 1927 passed the Jones Act (Act of Jan. 25, 1927, ch. 57, 44 Stat. 1026), which extended the original grants to cover mineral lands as well. Congress provided, however, that any disposition of the lands must contain a reservation of the minerals to the State. § 1(b), 44 Stat. 1026-1027. The Act also empowered each State to lease the mineral lands "as the State legislature may direct," and provided that any proceeds, rents, or royalties from these lands are "to be utilized for the support or in the aid of the common or public schools" (*ibid.*).

Section 28 of the Enabling Act has been amended subsequent to the enactment of the Jones Act to provide specific mineral leasing rules applicable to Arizona's school trust lands. In 1936, Congress struck the clause of Section 28 that had excluded leases for a term of five years or less from the Act's advertising requirements. Act of June 5, 1936, ch. 517, 49 Stat. 1477. In its place, Congress distinguished between leasing for grazing and agricultural purposes and leasing for mineral purposes. It

Enabling Act. See *Deer Valley Unified School District No. 97 v. Superior Court*, 760 P.2d 537 (Ariz. 1988). Section 3 of Article 10 incorporates the Enabling Act's bidding and advertising requirements for sales and leases, and Section 4 incorporates the requirement that "[a]ll lands, lease-holds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained * * *." By Sections 1 and 9 of Article 10 of the Arizona Constitution, the restrictive provisions of the Enabling Act are extended to cover "all lands otherwise Acquired by the State." Thus, Arizona has decided to apply the restrictions of the Enabling Act to all the land it acquires for the school trust. See *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336 (Ariz. 1947).

authorized leases for grazing and agricultural purposes for ten years and leases for mineral purposes for 20 years, and provided that the leasing was to be conducted "in a manner as the State legislature may direct" (49 Stat. 1477). The 1936 amendment did not amend the language in Paragraph 4 of Section 28 of the Enabling Act requiring that "[a]ll lands, leaseholds, timber, and other products of land before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for less than the value so ascertained * * *." 36 Stat. 574.

In 1951, the Enabling Act was again amended to establish special rules for mineral leases for the exploration, development, and production of oil, gas, and other hydrocarbons. Act of June 2, 1951, ch. 120, 65 Stat. 51. Congress provided that such leases could be for a term of 20 years or less. As under the 1936 amendment regulating other mineral leases, the revised Section 28 provides that oil and gas leases may be made "in such manner as the Legislature of the State of Arizona may prescribe * * *." 65 Stat. 52. Unlike the provision relating to other mineral leases, the provision relating to oil and gas leases explicitly exempts them from the advertisement, bidding, and appraisal restrictions of the Enabling Act.³

2. The Arizona statute governing mineral leasing on state land requires that every mineral lease "provide for payment to the state by the lessee of a royalty of five per cent of the net value of the minerals produced for the claim." Ariz. Rev. Stat. Ann. § 27-234(B) (1976 & Supp. 1988). Net value is further defined as gross value after processing minus certain costs, such as production costs, transportation costs, and taxes. *Ibid.* Under

³ Section 28, as revised by the 1951 amendments, authorizes "the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas, and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance[s] may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of royalty to said State of not less than 12½% per centum of production * * *." 65 Stat. 52.

this scheme, the value of a claim is never individually determined and, therefore, there is no guarantee that the State will receive, at the least, the value ascertained by an appraisal. Rather, a flat royalty is applied in every case and, where deductible costs exceed gross value, no royalty at all is paid.

Several individual taxpayers who claim that their taxes support public education in Arizona and the Arizona Education Association, which represents approximately 20,000 public school teachers throughout the state, brought suit in state court against the pertinent state officials and a mining company seeking a declaration that Ariz. Rev. Stat. § 27.234(B) (1976 & Supp. 1988) is void and related relief.⁴ On cross-motions for summary judgment, the trial court found that Ariz. Rev. Stat. Ann. § 27-234(B) does not violate the Enabling Act or the Arizona Constitution. Pet. 37a-39a.

3. The Supreme Court of Arizona reversed. Pet. App. 1a-36a. It first noted the "sad experience" that led Congress to enact the strict trust terms of the New Mexico-Arizona Enabling Act. Pet. App. 5a-6a (quoting *Murphy*, 65 Ariz. at 351, 181 P.2d at 344). Of the 23 states that had previously been granted lands, the "dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state" by 1910 (*id.* at 5a). Through the New Mexico-Arizona Enabling Act, Congress intended "to severely circumscribe the power of state government to deal with the assets of the common school trust" (*id.* at 6a). The court noted (*id.* at 20a) that in *Lassen*, 385 U.S. at 463, 466, this Court observed that "[t]he central problem which confronted the [Enabling] Act's draftsmen was * * * to devise constraints which would assure that the trust received in full fair compensation for trust lands," and they solved this problem by

⁴ The originally named defendants were the Arizona State Land Department, the State Land Commissioner, and Cyrus Pima Mining Company. Magma Copper Company, Asarco, Inc., James Sullivan, Eisenhower Mining Company, and Can-Am Corporation were permitted to intervene as defendants. The trial court subsequently certified the case as a defendant class action, the class consisting of all present and future mineral lessees of state land.

"unequivocally demand[ing] * * * that the trust receive the full value of any lands transferred from it."

The court below rejected the mining companies' contention that the Jones Act and the 1936 amendment of Section 28 of the Enabling Act—which, like the Jones Act, authorized non-hydrocarbon mineral leasing "in such manner as the Legislature of the State of Arizona may prescribe"—free the Arizona legislature, in making mineral leases, from the terms of the trust established by the 1910 Enabling Act. That contention, the court held, "is completely contrary to the objectives sought by the restrictive wording of other portions of the Enabling Act" (Pet. App. 14a). As did the courts in *State Land Department v. Tucson Rock & Sand Co.*, 12 Ariz. App. 193, 195, 469 P.2d 85, 87 (1970), vacated on other grounds, 107 Ariz. 74, 481 P.2d 867 (1971), and *Oklahoma Education Association v. Nigh*, 642 P.2d 230, 237 (Okla. 1982), the Arizona Supreme Court concluded that that language "is not an unbridled grant of power that would allow the legislature to avoid the trust restrictions and duties imposed by the entirety of the Enabling Act," but instead grants authority to set lease terms not in conflict with the express terms of the Enabling Act (Pet. App. 15a).

The court further stated that the amendment of Section 28 of the Enabling Act in 1951 reinforced its conclusion that the 1936 amendment of the Enabling Act did not give the legislature authority to avoid the appraisal requirement. The 1951 amendment added the provision stating that oil and gas leases (but not other mineral leases) could be "made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe." 65 Stat. 52. By that amendment, the court stated, "Congress showed that when it intended to free the state from the dispositional restrictions, it would do so explicitly" (Pet. App. 19a). "Moreover," the court added (*id.* at 20a), "if Congress did not regard the dispositional restrictions of the original Enabling Act as effective against mineral leases, why

did it bother to create specific exemptions in 1951 for oil, gas, and other hydrocarbon leases?"⁵

The Arizona Supreme Court also noted that this Court's decision in *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), supported its decision. In that case, the federal government had condemned school trust lands, and a company that had leased some of the condemned lands from Arizona sought an award to compensate it for the fact that the rent it owed the State was less than the fair rental value of the property. In remanding the case for further determinations, the Court questioned the validity of the company's claim, even though Section 28 of the Enabling Act provides that grazing lands, like mineral lands, may be leased "in such manner as the Legislature of the State of Arizona may prescribe." 65 Stat. 52. The Court relied on the fact that, notwithstanding that provision, Section 28 "has a protective provision against the initial setting of lease rentals at less than fair rental value" that "provides that a leasehold before being offered, shall be appraised at 'true value'" (424 U.S. at 305, 306).⁶ The decision in *Alamo*, the Arizona Supreme Court stated, "seem[s] fully dispositive of the issue" presented in this case (Pet. App. 22a).

⁵ The Arizona Supreme Court also found support for its construction of Section 28 in Joint Resolution No. 7 (S.J. Res. 38, ch. 28, 45 Stat. 58), a 1928 congressional resolution relating to New Mexico. The resolution stated that New Mexico could amend its constitution to provide that mineral leases on school lands "may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature." If Congress had generally intended through the Jones Act to authorize the state legislatures to avoid the appraisal, advertisement, and competitive bidding requirements, then, the court concluded, "it would have used explicit language to accomplish that result, just as it did for New Mexico in Joint Resolution No. 7" (Pet. App. 17a).

⁶ The Court in *Alamo Land & Cattle Co.* further explained that a difference between the "rental specified in the lease and the fair rental value" could arise in one of two ways (424 U.S. at 304). First, it could be that "the lease rentals were set initially at less than fair rental value" (*ibid.*), in which case the lease would be void under Section 28 of the Enabling Act. Second, the lease might

Having concluded that "the Enabling Act and its rescript in art. 10 of the Arizona Constitution * * * forbid the state from making nonhydrocarbon mineral leases without appraisal or for less than their true value" (Pet. App. 24a), the court then considered the validity of the state's mining statute. Because the statute provides that the royalty due is five percent of the net value of the minerals produced, and the deductible costs used to calculate net value may exceed the gross value of the minerals, the court concluded that "under § 27-234(B) it is possible for a lessee to extract minerals from school trust lands and pay no royalty whatsoever" (*id.* at 26a). After adding that "we have no way of knowing from this record whether such circumstances have existed" (*ibid.*), the court remanded with instructions that the trial court enter a judgment declaring the statute unconstitutional and take further evidence to determine "what further relief is appropriate" (*id.* at 29a).

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction because 28 U.S.C. 1257 authorizes review only of "[f]inal judgments or decrees" of state courts, and this case is in an interlocutory posture. On remand, the trial court will first need to determine whether the State has received "true value," or any value, for mineral leases on the school trust lands. It will then have to decide what "substantial conformity" in Paragraph 9 of Section 28 of the Enabling Act means, an issue of federal law, because that Paragraph provides that leases not made in substantial conformity with the requirements of the Enabling Act are void. Finally, it will have to apply its legal determination on that issue to the facts that it finds in order to determine whether any leases are void. In that situation, where important federal legal issues and key factual questions must be addressed on remand, this Court lacks jurisdiction. *Flynt v. Ohio*, 451 U.S. 619, 620 (1981); *Minnick*

initially have been set at the fair rental value, but that value might have increased during the term of the lease (*id.* at 305), in which case the company might be entitled to an award to compensate it for the loss of the lease. The Court remanded with instructions that the lower courts determine how the difference between the rental specified in the lease and the fair rental value arose and enter judgment accordingly (*id.* at 311).

v. *California Department of Corrections*, 452 U.S. 105, 127 (1981); see *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-487 (1975).

2. The plaintiffs lack standing under Article III to bring suit challenging Arizona's mineral leasing statute. The individual plaintiffs claim standing merely as taxpayers, and this Court has repeatedly rejected claims that a person may bring suit under Article III based on his status as a citizen or taxpayer. Rather, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The individual plaintiffs have not alleged such injury; their claim that their tax rates will be lowered by the relief they request is, as Asarco itself argued in the trial court, "wholly speculative." Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, Memo. at 9. The Arizona Education Association likewise has failed to show that its members are likely to benefit from the relief requested.

It follows for Article III purposes that the decision of the Arizona Supreme Court is, in effect, an advisory opinion. In *Doremus v. Board of Education*, 342 U.S. 429, 434 (1952), this Court held that while a state court may "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory, * * * because our own jurisdiction is cast in terms of 'case or controversy,' we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such." As that holding makes clear, this Court lacks power to review a decision, such as the decision below, where the plaintiffs lack standing under Article III.

3. If this Court concludes that it has jurisdiction, it should affirm the decision below. Paragraph 4 of Section 28 of the Enabling Act provides that the school trust lands must be appraised before being leased, and further provides that the school trust must receive, at the least, the appraised value for any lease.

Paragraph 3 of Section 28 excepts oil and gas leases, but not other mineral leases, from the appraisal requirement. Thus, as this Court held in *Alamo Land & Cattle Co.*, 424 U.S. at 306, the Enabling Act plainly requires that, "before being offered," school trust land other than that leased for oil and gas production "shall be appraised at 'true value.' "

Contrary to petitioner's argument that the unknown mineral lands that passed to Arizona in 1910 were not covered by the appraisal requirement, Paragraph 4 of Section 28 expressly subjects *all* leaseholds of lands granted by the Enabling Act to its restrictions. Nor is there merit to petitioners' contention that the known mineral lands that passed under the Jones Act in 1927 passed free of the appraised requirement. Nothing in that Act explicitly so provides, and, since the appraisal requirement was "[u]ndoubtedly the most important restriction" (Pet. App. 23a), there is no basis for concluding that Congress intended to do away with that restriction in the absence of clear evidence that it so intended. Moreover, the 1951 amendment to Section 28, which freed oil and gas leases, but not other mineral leases, from the appraisal requirement, shows that Congress did not intend to do away with that requirement with respect to petitioners' leases. Furthermore, petitioners' contention that the mineral lands are not subject to any restrictions is completely undercut by the terms of Article 10 of the Arizona Constitution, which specifically incorporates the restrictions in Section 28 of the Enabling Act and extends them to all the land Arizona acquires.

ARGUMENT

I. THIS COURT LACKS JURISDICTION BECAUSE THERE HAS BEEN NO "FINAL JUDGMENT OR DECREE" AS REQUIRED BY 28 U.S.C. 1257

Although 28 U.S.C. 1254 allows interlocutory review of decisions of federal courts, 28 U.S.C. 1257 provides that this Court may review only "[f]inal judgments or decrees" of state courts. "In general, the final-judgment rule has been interpreted 'to preclude reviewability . . . where anything further remains to be

determined by a State court, no matter how dissociated from the only federal issue that has been finally adjudicated by the highest court of the State.' " *Flynt v. Ohio*, 451 U.S. 619, 620 (1981), quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). There is much to be determined on remand here. Section 28 provides that leases "not made in *substantial conformity* with the provisions of this Act shall be null and void" (emphasis added), and the state courts here have not yet decided what criteria will be used to determine whether a lease is in "substantial conformity" with the terms of the Act. In addition, the court below stated that it had "no way of knowing from this record" whether mineral lessees had paid "true value" (or any amount), as required by Paragraph 4 of Section 28, and ordered further factfinding. Thus, it is not clear whether any leases will be declared void. Accordingly, this Court lacks jurisdiction at this time to review the Arizona Supreme Court's decision under 28 U.S.C. 1257(3), the basis of jurisdiction on which petitioners rely.

To be sure, there are "four categories of * * * cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). By and large, those cases involved situations where the "additional proceedings would not require the decision of other federal questions that might also require review by the Court" (*ibid.*). This case is not one of those. The key legal decision to be made on remand, what "substantial conformity" in Section 28 of the Enabling Act means, is plainly a question of federal law. Moreover, it is a question that may be crucial to the ultimate resolution of this lawsuit, since the courts below may conclude that any lease for which the State has received or is likely to receive true value will be held to be valid despite the absence of an appraisal. Accordingly, review at this time would be premature.

More detailed consideration of the four exceptions listed in *Cox* to Section 1257's rule that only final judgments of state

courts are reviewable confirms that review is not proper. The first category includes case where "the outcome of further proceedings [is] preordained" (420 U.S. at 479). That is obviously not the case here. While Paragraph 9 of Section 28 provides that leases "not made in substantial conformity with the provisions of this Act shall be null and void," it is not yet clear, as we have stated, whether petitioners' leases substantially conform to the requirements of the Enabling Act. Only if petitioners were willing to concede that their leases are null and void would the outcome on remand be preordained and review be proper now.⁷

The second exception to Section 1257's finality requirement involves cases where " 'the federal questions that could come here have been adjudicated by the State court,' " and the state court issues that remain to be decided are essentially ministerial. *Cox*, 420 U.S. at 480, quoting *Radio Station WOW*, 326 U.S. at 127. This exception is plainly inapplicable here since, as noted, important federal issues remain to be decided on remand. The third exception, cases where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case" (*Cox*, 420 U.S. at 481), is likewise plainly inapplicable. If petitioner's leases are declared void on remand, the federal question they seek to resolve now would not be moot and no disability

⁷ By contrast, in *Duquesne Light Co. v. Barasch*, No. 87-1160 (Jan. 11, 1989), the Pennsylvania Supreme Court, reversing a decision of the state's public utilities commission, decided that a state statute prohibited a utility from recovering the costs of a nuclear power plant that never went into service, rejected the utility's argument that the state law thus interpreted constituted a taking of property without just compensation under the federal Constitution, and remanded for the issuance of a rate order giving effect to its conclusion (slip op. 5). This Court held that the Pennsylvania Supreme Court's decision, while not final because of the remand for a corrected rate order deleting the allowance of recovery for the costs expended in building the canceled nuclear power plant, fell into the first exception listed in *Cox*. The Court explained that the "Pennsylvania Supreme Court has finally adjudicated the constitutionality of [the state statute] in the context of otherwise completed rate proceedings and so has left 'the outcome of further proceedings preordained.' " Slip op. 6 (quoting *Cox*, 420 U.S. at 479). Here, however, the answer to the question whether petitioners' leases are valid, the ultimate issue in this case, is not preordained.

that does not presently exist (see pages 14-20, *infra*) would bar them from seeking review.

The final exception consists of cases where "the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, * * * reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action, * * * [and] a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-483. While the court below could, following remand, amend its decision so that it is based entirely (rather than alternatively) on state law grounds, which would preclude review by this Court, this final exception to Section 1257 is also inapplicable here. First, petitioners, "the party seeking review here," cannot moot the federal issue by prevailing on state grounds. While the restrictions on disposal of the school trust lands in the Arizona Constitution may be more or less stringent than the restrictions in the Enabling Act, if they are *less* stringent Arizona (and petitioners) must nevertheless abide by the federal restrictions as well. Second, reversal of the decision below by this Court would not "preclud[e] * * * further litigation" because the requirements of Article 10 of the Arizona Constitution may well be *more* restrictive than the requirements of the Enabling Act; so that question would remain and the litigation would continue. Cf. *Deer Valley Unified School District No. 97 v. Superior Court*, 760 P.2d 537, 541 (Ariz. 1988), where the Arizona Supreme Court declined to interpret language in the state Constitution as this Court had interpreted identical language in the Enabling Act because it concluded that this Court's decision was not sufficiently protective of the school trust fund. And third, there is no basis for a contention that federal policy would be "seriously erode[d]" if this Court does not review the decision below now.

Since no exception to the plain language of Section 1257 applies here, this Court lacks jurisdiction. Moreover, this case presents a situation where a difficult question of federal law (the meaning of "substantial conformity" in Paragraph 9 of Section 28) remains to be decided on remand and there is no good

reason not to wait for a final judgment. To the contrary, there are important reasons to await a final judgment because, along with the legal issue that will need to be addressed on remand, important factual findings will be made as well. At this stage, as the court below stated (Pet. App. 26a), the record discloses very little about the value that Arizona has received in exchange for mineral leases on the school trust lands, and that information, which is to be supplied on remand, will inform any subsequent judgment on the importance and merits of the legal issues presented. Cf. *Minnick v. California Department of Corrections*, 452 U.S. 105, 127 (1981) ("because of significant ambiguities in the record concerning both the extent to which race or sex has been used as a factor in making promotions and the justifications for such use, we conclude that we should not address the constitutional issues until the proceedings in the trial court are finally concluded"). Here, moreover, resolution of the issues remaining to be determined on remand may obviate any need for this Court to address federal constitutional questions in this case (see Point II, *infra*). Thus, the normal policy disfavoring unnecessary decision of constitutional questions further supports application of Section 1257's plain terms here.

II. BECAUSE THE PLAINTIFFS LACK ARTICLE III STANDING, THIS COURT LACKS JURISDICTION

A. The Plaintiffs Lack Standing Because They Have Alleged No Personal Injury Likely To Be Redressed By The Relief They Have Requested

If this Court determines that the judgment below is final under 28 U.S.C. 1257, it should nevertheless dismiss for lack of jurisdiction because the plaintiffs lack Article III standing. The "core component" of standing under Article III is that the plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982). The plaintiffs here, individual citizens of Arizona and an association

that represents Arizona teachers, falter under each aspect of that test.

The individual plaintiffs claimed standing merely as taxpayers, rather than because their own more specific interests were injured. Complaint para. III. Under Arizona law, taxpayers have standing to seek to enjoin pecuniary loss to the public fisc. *Smith v. Graham County Community College District*, 123 Ariz. 431, 600 P.2d 44 (Ariz. App. 1979). Although the courts of the states are not barred by the federal Constitution from recognizing standing on such a theory, this Court has consistently held that a person does not satisfy the standing requirement of Article III based on nothing more than his status as a citizen or taxpayer who is interested in the conduct of his government. *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 215-221 (1974); *United States v. Richardson*, 418 U.S. 166, 171-175 (1974); *Doremus v. Board of Education*, 342 U.S. 429, 433-435 (1952); *Frothingham v. Mellon*, 262 U.S. 447 (1923); cf. *Allen*, 468 U.S. at 754-755, 756 n.21; *Valley Forge*, 454 U.S. at 482, 489-490 n.20. Accordingly, the individual taxpayers lack standing to invoke the jurisdiction of an Article III court.

Although Arizona has liberal standing rules, petitioner Asarco, after intervening in the superior court, moved to dismiss the complaint on the ground that the plaintiffs lack standing.⁸ With respect to the individual plaintiffs, Asarco described as "wholly speculative" their claim that they had suffered from higher taxes because the mineral leasing scheme set fourth by Arizona statute conflicts with Section 28 of the Enabling Act. Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, Memo. at 9. Asarco explained that even if a different leasing scheme generated more revenue, the state legislature, rather than lowering taxes, might well take the money from the state's general revenues that is currently spent on education and spend it on other programs. Even under Arizona law, Asarco contended, the plaintiffs lack standing

⁸ The superior court denied the motion without opinion by Order of March 30, 1982.

"because a prediction of legislative behavior is pure conjecture" (*ibid.*).

In arguing that the individual plaintiffs lack standing, Asarco was right, at least under federal law. Although petitioners argued in this Court in their supplemental brief in support of their petition for a writ of certiorari, without acknowledging their prior inconsistent position, that the individual plaintiffs brought "a good-faith pocketbook action" (Supp. Br. 3), any claim that the plaintiffs have suffered economic injury as a result of Arizona's mineral leasing law is far too tenuous to support standing under Article III. As an initial matter, it is not clear that a mineral leasing law requiring prior appraisal of the value of the leasehold would generate additional funds. Amicus Clinton Campbell Contractor, Inc., suggested in its brief filed prior to the granting of the petition (at 9) that "mineral explorers will shun Arizona's trust land" if appraisal is required, preferring "land in other states or jurisdictions" where such a requirement, which that amicus predicts will be very burdensome, is not mandated. Whatever the merits of that prediction, it is clear that, if the mining companies' leases are declared void, as the plaintiffs have requested (Pet. App. 38a), then state revenues from mineral leases will decline in the short term. And even if a revised leasing law would thereafter generate additional revenue, it is not clear that lower taxes would follow, as Asarco argued in the superior court. Moreover, the likely effect of any tax adjustment on each of the millions of individual taxpayers across the State would be very slight. That is all the more reason to give dispositive weight to the fact that it is "wholly speculative" whether tax rates will be affected at all.

Thus, while this Court has stated that taxpayers have standing where they seek "to restrain unconstitutional acts which result in *direct pecuniary injury*" (*Doremus*, 342 U.S. at 434 (emphasis added)), the plaintiffs have established no such injury here. Rather, "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing" (*Allen*, 468 U.S. at 759). Petitioners have cited no case

comparable to this one where taxpayers have been found to have standing.⁹

Asarco was also correct, under federal law at least, when it argued to the superior court that the Arizona Education Association lacks standing.¹⁰ While the Association alleged that "[t]he failure of the defendants to collect the true value on leases of State mineral lands * * * imposes an adverse economic impact on the Association and its members" (Complaint para. IV), by which it presumably means that the teachers it represents will receive more pay if it prevails in this suit, it is not at all clear that the result would be "likely" to follow from a favorable decision." *Allen*, 468 U.S. at 751 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38, 41 (1976)). There has been no showing that, if the State ultimately receives additional revenues as a result of leasing mineral lands following an appraisal, the state's teachers will receive pay raises they otherwise would not receive. It would seem at least as likely that, if additional revenues are received from mineral leases, then general funds currently spent on education will be put to other uses. Even if additional funds from mineral leases are used to benefit the schools, it is not at all clear that the benefits will be in the form of increased teacher compensation. Thus, the "links in the chain of causation" (*Allen*, 468 U.S. at 759) between a revised mineral leasing statute and a pay raise for

⁹ Petitioners primarily rely (Supp. Br. 3) on *Everson v. Board of Education*, 330 U.S. 1 (1947), where the Court rejected a challenge to the use of public funds for the transportation of parochial school students without discussing whether the plaintiffs had standing. The other cases petitioners have cited are also Establishment Clause cases, and, prior to this Court's decision in *Valley Forge*, "special hospitality [was] shown to standing to advance Establishment Clause claims." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* 654 (1984).

¹⁰ While Asarco previously agreed that the Association "can show no adverse economic impact which is not remote and speculative" (Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, Memo. at 10), petitioners now argue, without explaining or acknowledging their change of position, that the Association has made "an acceptable allegation of direct injury" (Supp. Br. 4).

teachers are extremely weak.¹¹ Accordingly, like the individual plaintiffs, the Association lacks standing because it has failed to allege personal injury fairly traceable to the defendants' conduct that is likely to be redressed as a result of the lawsuit.

B. This Court Lacks Jurisdiction If The Plaintiffs Do Not Have Standing Under Article III

If the plaintiffs lack standing under Article III, then this Court lacks jurisdiction to review the Arizona Supreme Court's judgment, even though the mining companies may well be injured by the relief to be granted on remand. In *Doremus*, this Court held that while a state court may "render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory, * * * because our own jurisdiction is cast in terms of case or controversy, we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue of federal law without review, any procedure which does not constitute such" (342 U.S. at 434). See also *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985); *Secretary of State of Maryland v. J. H. Munson Co.*, 467 U.S. 947, 954 & n.4 (1984); *Revere v. Massachusetts General Hospital*, 463 U.S. 239, 243 (1983). That holding is controlling here if, as we have argued, the decision below constitutes, at this juncture, an advisory opinion for Article III purposes.¹²

¹¹ Petitioners also note that, in addition to suggesting that teachers' compensation would be increased if the plaintiffs are granted the relief they seek, the Association alleges that "the 'quality of education in Arizona' has been adversely affected by the state's failure to require an appraisal before leasing mineral rights (Supp. Br. 4 (quoting Compl. para. IV)). That general allegation fails to show that the Association " 'personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Valley Forge*, 454 U.S. at 472 (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

¹² It has been suggested that *Doremus* could be read to mean that dismissal of a petition for a writ of certiorari is appropriate only if a state supreme court rejected the plaintiff's challenge in a proceeding in which the plaintiff did not satisfy Article III's standing requirements, and that this Court properly could vacate a state court decision that sustained the challenge in such a proceeding.

The conclusion that this Court lacks jurisdiction if the plaintiffs lack standing under Article III is the only conclusion that comports with the constitutional basis for the requirement that plaintiffs must allege that they have suffered personal injury fairly traceable to the defendant's conduct that is likely to be redressed by the lawsuit. Where the plaintiffs lack Article III standing, this Court lacks authority to decide their claim, and the Arizona Supreme Court cannot confer jurisdiction on this Court simply by addressing a question of federal law. Petitioners have not attempted to explain what gives this Court jurisdiction over this case if the plaintiffs lack standing under Article III. Rather, they argue that it would be more convenient for them if this Court reviewed their challenge to the merits of the Arizona Supreme Court's decision now. Convenience, however, does not confer power to resolve lawsuits where there is no case or controversy, since "Article III of the Constitution confines the federal courts to adjudicating actual 'cases' and 'controversies'" (*Allen*, 468 U.S. at 750).¹³

See *Barnes v. Kline*, 759 F.2d 21, 63 n.16 (D.C. Cir. 1984), vacated as moot, 479 U.S. 361 (1987) (Bork, J., dissenting), vacated as moot, 479 U.S. 361 (1987); L. Tribe, *American Constitutional Law* 114 n.20 (2d ed. 1988). We disagree. *Doremus* appears to make clear that a federal court will not give preclusive effect to the unreviewed state court decision in a future case, not that this Court could vacate a state court decision on review in the same case because of the absence of a case or controversy. The latter suggestion would have been inconsistent with the Court's explicit disclaimer (342 U.S. at 434) of any suggestion that a state court is barred from rendering an advisory opinion on a federal constitutional question where Article III standing is lacking. Moreover, there would be an additional step from the proposition that this Court could vacate a state court decision construing federal law where the plaintiffs lacked Article III standing to the conclusion that this Court may review the decision on the merits, despite the absence of a case or controversy. The fact that the plaintiffs have obtained a judgment in their favor and are now respondents does not, in our view, transform them into proper Article III adversaries with a different stake in the underlying controversy.

¹³ Although petitioners now state that "[b]oth sides believed that they were asking the Arizona courts to resolve a genuine dispute, and those courts would be surprised to learn that they had rendered a mere *advisory opinion*" (Supp. Br. 4-5 (emphasis added)), Asarco told the superior court that, "[n]o matter how genuinely felt or loudly proclaimed, general dissatisfaction with

Moreover, the practical problems petitioners face are not as difficult as they suggest. Petitioners first state that they would have "an uphill battle" avoiding the collateral estoppel effect of the decision below in a subsequent action they might bring in a federal court challenging any relief that may be granted on remand (Supp. Br. 5).¹⁴ But if, as we submit, the plaintiffs lack standing under Article III and the decision below therefore amounts to no more than an advisory opinion that cannot provide the basis "for conclusive disposition of an issue of federal law" (*Doremus*, 342 U.S. at 434), the lower federal courts clearly would not be bound by it.

Petitioners also note that the fact that the decision below is, for Article III purposes, an advisory opinion, "is small solace" to them since "the whole issue may be concluded by conforming legislative action" (Supp. Br. 6). That, however, is merely a species of the classic argument for advisory opinions to inform legislative action – an argument incompatible with Article III. Indeed, petitioners' situation would be entirely comparable if the Arizona Attorney General had issued an advisory opinion concluding that the state's mineral leasing scheme violated Section 28 of the Enabling Act. In that circumstance the legislature might also amend the statute to cure the defect, but petitioners could not suggest that this Court somehow had jurisdiction to review an advisory opinion if a state attorney general, rather than a state supreme court, had issued it.

legislative action, which has no direct adverse impact upon the parties seeking to invoke the judicial machinery, is no substitute for the jurisdictional prerequisite of standing to sue. * * * [Plaintiffs] may not seek what would amount to an *advisory opinion* from the courts." Asarco's Reply to Pltf. Response to Asarco's First Mot. to Dismiss, Aug. 13, 1981, at 3 (emphasis added).

¹⁴ If the superior court ultimately invalidates any lease, then the injured mining company would have standing to bring a declaratory judgment action in federal court seeking an order that nothing in the Enabling Act required that invalidation. Indeed, in light of the decision below, they may now have standing to bring such an action.

III. ARIZONA'S SCHOOL TRUST LANDS MAY NOT BE LEASED FOR LESS THAN THEIR APPRAISED VALUE

A. Section 28 Plainly Provides That The School Trust Lands "Shall Be Appraised At Their True Value" And Prohibits Leases "For A Consideration Less Than The Value So Ascertained"

If this Court concludes that it has jurisdiction to review petitioner's claims, then it should affirm the decision of the Arizona Supreme Court. As that court concluded, Section 28 of the Enabling Act plainly requires that, if school trust lands are leased for mineral purposes other than the production of oil and gas, they must be leased at their true value as determined by an appraisal.

Paragraph 3 of Section 28 provides generally that school trust lands may not be sold or leased "except to the highest and best bidder at a public auction, * * * notice of which public auction shall first have been duly given by advertisement." It also establishes certain detailed rules concerning the nature of the advertising and the auction. Immediately following the lengthy sentence establishing the advertising and auction rules, Paragraph 3 lists four provisos relating to leasing, two of which govern mineral lands. The first of the two provisos relating to mineral leases states that "[n]othing herein contained" prohibits the state legislature from prescribing rules governing leasing "for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less." The second provides that "[n]othing herein contained" prohibits leasing for the production of oil, gas, and other hydrocarbon substances "in any manner, *with or without* advertisement, bidding, or *appraisement*, and under such terms and provisions as the Legislature of the State of Arizona may prescribe" (emphasis added). 65 Stat. 51-52. A separate paragraph, Paragraph 4 of Section 28, states the requirement at issue in this case. It provides that "[a]ll * * * leaseholds, * * * before being offered, shall be appraised at their true value, and no sale or other

disposal thereof shall be made for a consideration less than the value so ascertained." 36 Stat. 574.

The natural reading of the language of Section 28 is that mineral leases, other than for the production of oil and gas, must be made at true value as determined by an appraisal. Paragraph 4 provides generally that all leases must be made at that value. Paragraph 3 provides an explicit exception to the appraisal requirement for oil and gas leases, but does not provide an exception for other mineral leases. Therefore, the conclusion seems inescapable that leases for other mineral purposes must be made at appraised value.

Moreover, this natural reading is strongly supported by the statutory purposes. As this Court recognized in *Lassen*, 385 U.S. at 463, 466, "[t]he central problem which confronted the Act's draftsmen was * * * to devise constraints which would assure that the trust received in full fair compensation for trust lands," and they solved this problem by "unequivocally demand[ing] * * * that the trust receive the full value of any lands [or leaseholds] transferred from it." The Arizona Supreme Court similarly stated, with respect to the restrictions established by the Enabling Act, "[u]ndoubtedly the most important restriction is the appraisal/true value requirement." Pet. App. 23a. Thus, requiring that the school trust fund receive the appraised value of any disposition of minerals on the school trust lands gives effect to the key provision and central purpose of Section 28.¹⁵

Petitioners' argument that no mineral lands must be appraised before being leased (Pet. Br. 21) hinges on the phrase

¹⁵ Petitioners argue (Pet. Br. 31, 43), relying on a statement made in 1921 with respect to a bill that was not passed, that it is practically impossible to appraise mineral lands. That is not so. While it can be difficult, mineral lands are regularly appraised in connection with condemnation proceedings, as petitioners acknowledge (Pet. Br. 36). Moreover, as petitioners also recognize (Pet. Br. 7), Arizona law currently provides for the granting of exclusive prospecting licenses that give a preference to the prospector in obtaining a lease if minerals are discovered. Requiring prospecting prior to leasing would make appraisal easier, while a preference in favor of prospectors encourages exploration, and neither is inconsistent with the requirement that the State obtain true value for mineral leases.

"[n]othing herein contained shall prevent," which precedes the four provisos listed in paragraph 3 of Section 28, and the statement in three of the four provisos, including the provisos relating to mineral leases, that the land may be leased "as the Legislature of the State of Arizona may prescribe." Petitioners contend that the language freed the legislature from all of the restrictions in the Enabling Act. As the court below concluded (Pet. App. 15a), however, that language is logically read as giving the legislature "power to regulate the overall manner of the making of the lease, and the general terms of the lease, so long as there is substantial conformity to the restrictions of § 28." The Arizona Supreme Court's construction properly recognized that the appraisal requirement was critical to the scheme Congress established, since it was the key restriction designed to avoid the "sad experience" of other states (Pet. App. 5a).

The language on which petitioners rely can also be read to eliminate the advertising requirement but not the appraisal requirement. As originally enacted, Paragraph 3 of Section 28 provided, immediately following the sentence establishing the advertising requirement, that "nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required" (Pet. Br. 9a). Thus, the phrase "nothing herein contained," as first drafted, referred to no restriction other than the advertising restriction; it plainly did not lift the appraisal requirement.¹⁶ There is no indication that Congress ever intended to expand its meaning.

While subsequent amendments to Paragraph 3 of Section 28 have made it less clear whether the phrase "nothing herein contained" still refers only to the advertising requirement established by the sentence immediately preceding the phrase, that is a reasonable way to read it. Indeed, that is how the drafters of the Arizona Constitution have read it. The rescript of the Enabling Act restrictions contained in Article 10 of the State

¹⁶ This straightforward reading is not contradicted by petitioners' argument (Pet. Br. 21) that "herein," as used elsewhere in the Enabling Act, sometimes refers to more than the paragraph in which the word is used.

Constitution deviates from the language of Section 28 of the Enabling Act in that the words "without advertisement" are inserted at the end of the exceptions relating to leases other than for oil and gas production.¹⁷ Thus, the parallel provision of the State Constitution appears to authorize the legislature to avoid the advertising requirement only. It plainly does not authorize the legislature to avoid the appraisal requirement, which is contained in Section 4 of Article 10 of the State Constitution and is not mentioned in the provision of the State Constitution giving the legislature authority over the manner of leasing nonhydrocarbon mineral lands.¹⁸

¹⁷ Article 10, section 3 of the Arizona Constitution provides, in pertinent part (emphasis added):

Nothing herein, or elsewhere in article X contained, shall prevent:

1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, *without advertisement*.
2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, *without advertisement* * * *.

¹⁸ Petitioners have not attempted to come to grips with the fact that Article 10 of the Arizona Constitution, while similar to Section 28 of the Enabling Act, differs in certain respects, and, even in those respects in which it does not differ, may be given a different construction by the Arizona courts. Since the court below relied alternatively on the Arizona Constitution ("[w]e hold, therefore, that A.R.S. § 27-234 violates art. 10 of the Arizona Constitution and § 28 of the Enabling Act" (Pet. App. 27a)), that defect is fatal. At most, this Court may remand this case to the Arizona Supreme Court with instructions that it may not base its holding on the Enabling Act. Given the different language of the State Constitution, however, and the court's decision below and in *Deer Valley Unified School District No. 97*, 760 P.2d at 541, where the court recently declined to follow a decision of this Court construing the Enabling Act "in interpreting the identical language in the Arizona Constitution" because the court concluded that this Court's analysis was not sufficiently protective of the school trust fund, it seems clear that the result below will not change. For that reason, this Court may wish to decline the question presented if it determines that it has jurisdiction.

Indeed, in *Alamo Land & Cattle Co.* this Court read Section 28 as requiring an appraisal before lands are leased for purposes other than oil and gas production. The Court held that the Act requires that grazing leases, "before being offered, shall be appraised at 'true value'" (424 U.S. at 306). As it does with respect to mineral leases other than for the production of oil and gas, Section 28 provides that "[n]othing herein contained" prohibits grazing leases of a certain term, and states that such leases may be made "under such terms and provisions as the Legislature of the State of Arizona may prescribe." Accordingly, this Court has already concluded that the exception clause in Paragraph 3 of Section 28 does not free Arizona from the appraisal restriction. There is no reason in this case to depart from that reading, which follows from the plain language of the statute and gives effect to its key provision.

B. The History Of The Enabling Act Confirms That Mineral Lands Are Subject To The Requirement That They Be Appraised Prior To Being Leased And Leased At No Less Than Their Appraised Value

Contrary to petitioners' contentions, the history of the Enabling Act and related enactments, including the Jones Act of 1927 and Article 10 of the Arizona Constitution, confirms that the Enabling Act, both as enacted in 1910 and as amended, subjects all of the school trust lands, except for lands used for oil and gas production, to the requirement, set forth in paragraph 4 of Section 28, that they be appraised prior to being leased and leased "for a consideration [no] less than the value so ascertained."

Adopting the New Mexico Supreme Court's analysis in *Neel v. Barker*, 204 P. 205 (1922), petitioners argue (Pet. Br. 24-25) that the unknown mineral lands that passed to Arizona under this Court's decision in *Wyoming v. United States* were never subject to the restrictions in the Enabling Act. The trial court in *Neel* reasoned, and the New Mexico Supreme Court agreed (204 P. at 207), that Congress in 1910 did not intend to convey mineral lands under the Enabling Act, so it "did not have in mind a mineral lease" in drafting the restrictions in Section 28,

and those restrictions therefore do not apply to mineral leases. That argument is severely flawed. First, the court in *Neel* erred in its basic assumption that Congress did not have mineral lands in mind when it granted the school trust lands in Arizona in 1910. The rationale underlying the Court's decision in *Wyoming v. United States*, which held that unknown mineral lands passed under school trust grants, was that Congress, while intending to require the States to trade known mineral lands in the numbered sections granted them for other lands, did not intend that its "grant should be rendered nugatory by any future discoveries of mineral" (255 U.S. at 499). Since Congress undoubtedly knew that much western land not known to contain minerals at the time of a grant would subsequently be discovered to contain minerals, yet it intended to grant those unknown mineral lands to the States, Congress contemplated grants of mineral lands.

In any event, Congress in 1910 comprehensively subjected "[all] lands, leaseholds, timber, and other products of land" to the appraisal requirement. Accordingly, mineral leases are plainly subject to the requirement, and that is so whether or not Congress specifically had mineral leases in mind. For example, Congress did not have condominiums or shopping malls in mind when it drafted the Enabling Act in 1910, but no one would suggest that the school trust lands may be sold or leased to a condominium builder or a shopping mall developer without an appraisal. Indeed, since the broad language of Paragraph 4 subjecting *all* leaseholds to its restrictions was designed to ensure that the trust would receive "true value" upon disposition of the granted land, there is no reason to believe that Congress intended to require advertising and an appraisal before every small tract of non-mineral land, even desert land, is sold or leased, while simultaneously allowing the disposal of the mineral wealth contained in the trust lands without any restrictions at all.

Nor are petitioners correct in contending (Pet. Br. 26-34) that the known mineral lands that Congress conveyed to the States by means of the Jones Act in 1927 passed without restriction. While the Jones Act does not itself contain restrictions com-

parable to those found in Section 28 of the Enabling Act, Section 1(a) of the Jones Act expressly provides that the prior grants are "extended" to cover known mineral lands and that the Jones Act grant was "of the same effect" as the prior school trust land grants.¹⁹ Providing that the grant was "of the same effect" was clearly more efficient than attempting to list all of the restrictions in the many prior acts granting school trust lands to the western States.²⁰

Nor did the language of the Jones Act authorizing mineral leasing in the manner that the legislatures of the various States direct free Arizona from the appraisal requirement, for the same reasons that the parallel language added to the Enabling Act in 1936 did not have that effect (see pages 22-25, *supra*). Moreover, petitioners' interpretation of the Jones Act would mean that the Jones Act perpetuated the very problem it was intended to solve. Since, in our view, the unknown mineral lands undoubtedly passed to Arizona in 1910 subject to the terms of the school trust, then, if the known mineral lands passed in 1927 outside the terms of the trust, it would be necessary to determine whether each parcel of school trust land containing minerals was known to contain minerals in 1910 in order to

¹⁹ Petitioners complain (Pet. Br. 33-34) that Congress should have treated the western States uniformly by placing the same restrictions on each State. However, Congress's overriding purpose in enacting the Jones Act was to settle the costly litigation over whether lands were known to contain minerals at the time of the prior grants to the States, not to revise its prior grants to treat the States uniformly. See, e.g., S. Rep. 603, 69th Cong., 1st Sess. 1-2 (1926).

²⁰ Petitioners argue (Pet. Br. 32-34) that by the "same effect" language Congress meant no more than that the lands granted under the Jones Act would pass and vest in the same manner as prior grants. That, however, is not what the Jones Act says. Section 1(a) provides that "the grant of numbered mineral sections under this Act shall be of the same effect as prior grants for the numbered nonmineral sections, *and* titled to such numbered mineral sections shall vest in the States at the time and in the manner and be subject to all the rights of adverse parties recognized by existing law in the grants of numbered nonmineral sections" (emphasis added). 44 Stat. 1026. The comments of Senator Work upon which petitioners rely (Pet. Br. 33) plainly refer to the portion of the sentence following the word, "and," and shed no light on the meaning of the phrase "of the same effect."

See et seq.

determine whether the restrictions of the Enabling Act applied. That is surely not the result Congress intended.

The 1928 amendment of the New Mexico Constitution also supports the conclusion that the restrictions in Section 28 apply to mineral lands in Arizona. Despite the New Mexico Supreme Court's ruling in *Neel v. Barker* that the Enabling Act's restrictions did not apply to the unknown mineral lands in New Mexico that passed to the state pursuant to the Enabling Act in 1910, and the passage of the Jones Act, which petitioners contend passed the known mineral lands to the western States free of any restrictions, the Governor of New Mexico, concerned that the restrictions in the Enabling Act applied to the mineral lands granted New Mexico, petitioned Congress to pass a joint resolution authorizing the State to amend its Constitution to exempt mineral leases from the restrictions of the Enabling Act. A New Mexico congressman advised Congress that the resolution was needed so that "New Mexico will be relieved from some provisions of its enabling act," including the restriction at issue. 69 Cong. Rec. 2095 (1928) (statement of Rep. Morrow). Thus, petitioners err in suggesting (Pet. Br. 24-25) that it was understood that the Jones Act freed the mineral lands in the western States of the restrictions in the various enabling acts.²¹

²¹ Contrary to petitioner's contentions (Pet. Br. 37-39), the 1936 amendment to the Enabling Act, which authorized mineral leasing in the manner prescribed by the Arizona legislature, does not support their argument. The committee reports described that amendment as "remov[ing] certain restrictions contained in the Enabling Act." S. Rep. 1939, 74th Cong., 2d Sess. 2 (1936); H.R. Rep. 2615, 74th Cong., 2d Sess. 2 (1936) (emphasis added). Obviously, the restrictions could be removed only if they applied, contrary to petitioners' contentions. While it is not clear exactly what restrictions Congress removed in 1936, the statements in the legislative history are congruent with either of our interpretations (see pages 22-24, *supra*) of the language added by the 1936 amendment. If the purpose of the amendment was to remove the advertising requirements only, as the drafters of the conforming amendment to the Arizona Constitution concluded, then those were the restrictions that were removed. If, as the court below concluded (Pet. App. 15a), the purpose was to allow leasing in "substantial conformity" with the requirements of Section 28, though not all its details, then those were the restrictions that were removed. There is no evidence at all that Congress intended to remove the appraisal requirement.

At all events, Article 10 of the Arizona Constitution provides in Section 1 that both the lands transferred to the State pursuant to the Enabling Act "*and all lands otherwise acquired by the State*, shall be by the State accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided" (emphasis added). Section 9 of Article 10 of the Arizona Constitution reiterates that "*all lands otherwise acquired by the State* *** may be sold or leased by the State in the manner, and on the conditions, and with the limitations, prescribed by the said Enabling Act and this Constitution" (emphasis added). Thus, it is clear beyond dispute that the unknown mineral lands that passed to Arizona in 1910 and the known mineral lands that passed in 1927 are subject to the restrictions applicable to all the school trust lands, including the appraisal requirement, unless the Enabling Act and the Arizona Constitution expressly remove the restrictions. Since, as we have shown, neither the Enabling Act nor the Arizona Constitution has been amended to repeal the appraisal requirement, except for lands used for oil and gas production, that requirement applies to all other school trust mineral lands.²²

²² Moreover, as the court below concluded (Pet. App. 20a), the 1951 amendment to the Enabling Act confirms that the appraisal requirement applies to mineral leases other than for oil and gas production. By lifting the appraisal requirement in the sentence in Paragraph 3 of Section 28 referring to oil and gas leases, while making no mention of the appraisal requirement in the preceding sentence relating to leasing for other mineral purposes, Congress obviously intended to continue to require an appraisal before the school trust lands in Arizona are leased for the production of minerals other than oil and gas.

CONCLUSION

This Court should dismiss the petition for lack of jurisdiction. If it does not, the judgment of the Arizona Supreme Court should be affirmed.

Respectfully submitted.

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No. 87-1661

In The
Supreme Court of the United States
October Term, 1988

ASARCO INCORPORATED, *et al.*,

Petitioners,

v.

FRANK KADISH, *et al.*,

Respondents.

On Petition for Writ of
Certiorari to the Arizona Supreme Court

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF OF AMICI CURIAE,
ALASKA MINERS ASSOCIATION, SOUTHWESTERN
MINERALS EXPLORATION ASSOCIATION, AND
GSA RESOURCES, INCORPORATED,
IN SUPPORT OF PETITIONERS**

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No. 87-1661

In The

Supreme Court of the United States

October Term, 1988

ASARCO INCORPORATED, *et al.*,*Petitioners,*

v.

FRANK KADISH, *et al.*,*Respondents.*On Petition for Writ of
Certiorari to the Arizona Supreme Court**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF PETITIONERS****INTRODUCTION**

This Court granted the Petition for Writ of Certiorari of ASARCO Incorporated, *et al.*, on October 10, 1988. Movants, Alaska Miners Association (AMA), Southwest Minerals Exploration Association (SMEA), and GSA Resources, Incorporated (GSA) (collectively referred to as Miners), previously moved this Court for, and obtained, permission to file a brief amicus curiae in support of ASARCO's petition for writ of certiorari.

Again, movants obtained permission from petitioners to file this brief amicus curiae in accordance with Supreme Court Rule 36.2. A letter of consent has been lodged with the clerk of the Court. Miners have attempted to obtain permission from the State of Arizona and the respondents to file the attached brief amicus curiae in support of petitioners. Respondents consented to participation by AMA and SMEA, but not GSA Resources. See consent lodged with the clerk. Permission from the state has not been forthcoming.

Miners seek leave of this Court to file the attached brief amicus curiae pursuant to Supreme Court Rule 36.3.

Miners represent a range of interests that have a vital stake in the proper interpretation of the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, and the Jones Act of 1927,¹ Pub. L. No. 570, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. § 870). The interests of Miners are described in more detail below.

A. The Alaska Miners Association

AMA is a nonprofit, membership industry association. AMA has approximately 1,500 members, most of whom reside throughout the State of Alaska. AMA is active in supporting and defending a balanced approach towards the regulation and leasing of mining claims. Towards this end, the Alaska Miners Association previously filed in this Court an amicus brief in support of ASARCO's petition for writ of certiorari in this case,

and an original petition for writ of certiorari in the analogous case, *Trustees for Alaska v. State of Alaska*, 736 P.2d 324 (Alaska 1987), cert. denied, 100 L. Ed. 2d 2013 (1988) (on issue of whether Alaska Statehood Act mandates a particular type leasing system).

A proper understanding of the predecessor legislation, the Jones Act, will support the creation of a reasonable leasing system in Alaska that will ensure proper benefits to the state without unduly burdening the Alaska minerals industry.

B. Southwestern Minerals Exploration Association

The Southwestern Minerals Exploration Association is a group of mineral exploration professionals who are actively involved in the shaping of natural resource development public policy. The association has been active in promoting and supporting legislation at the state level and in fostering better relationships with state land user groups. The association believes that the Supreme Court's decision will result in higher royalty rates and highly uncertain maximum levels of lease payments. This in turn will discourage mineral exploration and production from state mineral lands in Arizona. Instead, the emphasis for exploration would shift towards the remaining federal lands in Arizona and lands in other states and nations.

As a direct result of the Arizona Supreme Court's decision at least one member of the Southwestern Minerals Exploration Association has lost substantial business when an outside investor withdrew from a lease development program because of the uncertainties created by the court's decision.

¹ Also known as the School Lands Act of 1927.

C. GSA Resources, Incorporated

GSA is a small family owned and operated mineral consulting and mining company. In terms of finances and resources, it is in an entirely different class of mining company compared to ASARCO. As such, GSA does not believe that its interests can be completely represented by the larger mining companies. The impacts from an adverse interpretation of the Arizona leasing laws will be felt much more directly by small companies like GSA. GSA is operating leases on 1,659.26 acres from the State of Arizona.²

GSA has no assurance that if it continues to comply with the preexisting statutory duties with regard to these leases that it will be permitted to retain any interest in these leases, or if they might be auctioned to the highest bidder as implied by the Supreme Court. Finally, GSA has no way of knowing whether it has any property rights left in its leases or if those leases are a complete nullity. About all that is certain is that the royalty rate, found by the Arizona Supreme Court not to be based on fair market value, will rise with an adverse effect on the viability of GSA's mining operations. In short GSA is in the untenable position of having to meet its obligations on its leases while not knowing what return, if any, it will receive from those leases.

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² In order to obtain financing and bonding, the leases are personally owned by the family owners of GSA who are personally liable for any financial obligations.

CONCLUSION

There is a growing tendency for state courts to assume the prerogatives of legislative decision making for state land mineral leasing systems. Unfortunately, without the benefit of the legislative process, the consequences of this judicial legislation have been harsh for citizens who depend on mineral leasing on state lands. Movants for *amicus curiae* status represent a varied class of individuals in the mining community, both inside and outside of Arizona, who will be affected by the adverse precedent established by the Arizona decision.

Movants represent the small mining community, which has a unique perspective on prospecting and mining on state lands. This perspective is not the same as that held by the large multinational mining companies already participating in this suit. For these reasons, Miners respectfully request leave to file the attached brief *amicus curiae*.

DATED: November 23, 1988.

Respectfully submitted,

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No. 87-1661

In The
Supreme Court of the United States

October Term, 1988

ASARCO INCORPORATED, *et al.*,
Petitioners,
v.
FRANK KADISH, *et al.*,
Respondents.

On Petition for Writ of
Certiorari to the Arizona Supreme Court

BRIEF OF AMICI CURIAE OF ALASKA
MINERS ASSOCIATION, SOUTHWESTERN
MINERALS EXPLORATION ASSOCIATION,
AND GSA RESOURCES, INCORPORATED,
IN SUPPORT OF PETITIONERS

INTERESTS OF AMICI

The interests of amici are outlined in the motion for
leave to file brief amicus curiae.

OPINIONS BELOW

The decision of the Supreme Court of Arizona is reported in *Kadish v. Arizona State Land Department*, 747 P.2d 1183 (Ariz. 1987). The decision was issued on December 10, 1987, and reconsideration denied February 2, 1988. The Arizona Supreme Court's decision was from an appeal of a ruling by the Maricopa County Superior Court in *Kadish v. Arizona Land Department*, Case No. C433745. Both opinions are reproduced in ASARCO's appendix to its petition for writ of certiorari. The petition for writ of certiorari was granted October 10, 1988, and reported at 109 S. Ct. 217 (1988).

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Amici adopt petitioner ASARCO's statement of the statutes involved.

STATEMENT OF THE CASE

Arizona received nonmineral lands with statehood in 1910. These lands were for the benefit of a school lands trust. In 1927, Congress further granted mineral lands to Arizona. The 1927 legislation contained a provision that minerals must be leased "as the State legislature may direct."

Pursuant to this statute, Arizona established a leasing system for mineral deposits on state lands whereby the state collects 5% net royalties on mineral production. Respondents, Kadish, *et al.*, brought suit alleging that the royalty system violates the 1910 statehood enabling legislation because insufficient royalties are collected, and there are appraisal and auction requirements for mineral lands.

Respondents and amici believe that any leasing restrictions found in the 1910 legislation do not apply to mineral deposits. Kadish initially lost before Maricopa County Superior Court, but the Arizona Supreme Court reversed, holding that the present lease system violates the Enabling Act.

SUMMARY OF ARGUMENT

When Congress granted nonmineral lands to Arizona in 1910, it did not provide for the disbursement of mineral deposits subsequently discovered on those "nonmineral" lands. To remedy the problem of distinguishing "mineral" from "nonmineral" lands, Congress in 1927 granted to

the western states all school section lands whether they were nonmineral or mineral. Congress provided that minerals were to be leased "as the State legislature may direct," Congress did not extend the burdensome restrictions found in the 1910 Enabling Act to these mineral lands.

To impose restrictions, such as those for appraisal and auction, to mineral deposits would foreclose mineral development and reduce the value of the school lands trust in Arizona.

REASONS FOR REVERSING THE DECISION BELOW

A. The Leasing of State Mineral Lands Is Subject to Complete Legislative Jurisdiction

The Arizona Supreme Court's attempt to redefine Arizona's mineral leasing system is in large part a result of that court's basic failure to understand the distinction between mineral and nonmineral lands in the New Mexico-Arizona Enabling Act of 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, and the Jones Act of 1927, Pub. L. No. 570, ch. 57, 44 Stat. 1026 (codified as amended at 43 U.S.C. § 870). To put it succinctly, Congress granted the new State of Arizona only nonmineral lands under the 1910 Enabling Act, while it granted mineral lands in the 1927 Jones Act. The nonmineral lands are and always have been the subject of the appraisal and auction requirements found in the 1910 Act; the mineral lands were made expressly subject to the leasing provisions in the 1927 Act. No subsequent amendment to the Enabling Act encumbered the

leasing of mineral lands with any appraisal and auction requirements.

No state or federal legislative body ever considered placing appraisal and auction requirements upon mineral deposits. In 1910 such requirements were not considered with respect to minerals because the underlying assumption was that no mineral lands would be granted to the states. By the time 1927 and the Jones Act arrived it was perfectly clear that the states had mineral deposits—and then Congress ruled that mineral deposits must be treated differently and leased “as the State legislature may direct.” There is no evidence that Congress intended that mineral leasing be burdened with the 1910 Enabling Act restrictions. Indeed, for Congress to have placed appraisal or auction requirements upon mineral deposits would have been totally antithetical to the discovery and development of such deposits.

B. The Distinction Between Mineral and Nonmineral Lands Is Crucial to an Understanding of Leasing Requirements

The distinction between mineral and nonmineral lands is crucial not only in Arizona, but in other western states as well. For example, in *Trustees for Alaska v. State of Alaska*, 763 P.2d 324 (Alaska 1987), cert. denied, 100 L. Ed. 2d 2013 (1988), the Alaska Supreme Court correctly found that nonmineral lands, i.e., those lands not known to have been of mineral character at the time they were selected by the State of Alaska, are not subject to the mineral leasing provisions of Section 6(i) of the Alaska Statehood Act, 72 Stat. 339 (1958), codified at the note preceding 48 U.S.C. § 21. Instead, nonmineral lands are subject

to the same provisions for all general grant lands found in Sections 6(a) and 6(b) of the Alaska Statehood Act just as nonmineral lands in Arizona are subject to the 1910 Enabling Act requirements that include appraisal and auction.³

C. Subsection (b) of the Jones Act Provides the Complete Mechanism for Leasing Mineral Lands

The leasing of nonmineral lands granted pursuant to the 1910 Enabling Act is treated in full in that Enabling Act, and include, among other things, an appraisal and auction requirement. When Congress granted mineral lands to the states with the 1927 Jones Act, it expressly left to the states the details of leasing of those minerals. The Arizona Supreme Court ignored this express language, and instead treated the mineral lands granted in 1927 just the same as nonmineral lands granted in 1910. In doing so, the Arizona Court misinterpreted the structure of the Jones Act.

Subsection (a) of the Jones Act provides that the “grant of numbered mineral sections under this section shall be of the same effect as prior grants.” Subsection (b) of the Jones Act contains the clause that gives the state legislatures authority to lease minerals as they may direct. The Arizona Supreme Court interpreted the

³ Lands on which minerals were found after they were acquired by Arizona (or other western states) are not transformed into “mineral” lands; they remain nonmineral. See, e.g., *State of Wyoming v. United States*, 255 U.S. 489, 498 (1921); *United States v. Sweet*, 245 U.S. 563, 572-73 (1918). As for how mineral deposits on such “nonmineral” lands in Arizona are to be treated, see Part C.3 below.

general provisions of Subsection (a) of the Jones Act to have imposed certain Enabling Act requirements upon mineral leases thereby eviscerating the subsequent, more specific, and more liberal leasing provisions of Subsection (b). This is incorrect for several reasons.

1. The Language of the Jones Act Cannot Be Ignored

Words in statutes should not be read to be mere formalism without substance. *See, e.g., Inhabitants of Montclair Township v. Ramsdell*, 107 U.S. 147, 152 (1883) (interpretation of bonding statute); 2A *Sutherland Statutory Construction* § 4606 (4th ed. 1984). In this case, the words in the Jones Act that mineral lands are to be leased “as the State legislature may direct” cannot be ignored and parsed of all meaning.

2. Congress Never Intended to Impose Auction and Appraisal Requirements upon Mineral Leases

Second, Congress never intended to apply the restrictive appraisal and auction requirements to mineral deposits. In 1910 those requirements did not apply because mineral lands were not at issue. Indeed, when the Arizona Supreme Court stated there is “no congressional intent to remove the appraisal, trust, and true value restrictions from mineral leasing,” 747 P.2d at 1194, it was wide of the mark. Congress had never expressed any intent to impose those requirements upon mineral leases in the first place.

Furthermore, by 1927 Congress had backed away, somewhat, from its excessive paternalism of 1910. Instead deference was made to the states’ “business judgment,”

68 Cong. Rec. 1820 (1927), and the states were assumed to be “zealous and just as jealous of the public school fund as the federal government can be.” Hearings on S. 564 before the House Committee on Rules, 69th Cong., 2d Sess. 6 (1926). *See* extended discussion in ASARCO’s petition for writ at 13.

3. Subsection (a) of the Jones Act Did Not Establish any Substantive Restrictions on the Patent of Mineral Lands

Subsection (a) of the Jones Act protects third party rights in land to be transferred to the states; it does not incorporate the 1910 leasing restrictions.

While the 1927 Act granted mineral land to the states, it did not provide an actual mechanism for transfer of title to the states. That was accomplished in 1934. *See* Act of June 21, 1934, 48 Stat. 1185, 43 U.S.C. § 871 (repealed by Pub. L. No. 94-579, 40 Stat. 2792). In the 1934 legislation Congress provided that all land patents shall show “the extent to which the lands are subject to prior conditions, limitations, easements, or rights, if any.” This sort of language is the logical consequence of Subsection (a) of the Jones Act (“same effect as prior grants”). Without evidence that any mineral land patents actually contain the “appraisal and auction” conditions or limitations discovered by the Arizona court, such restrictions should not be implied.

4. Subsequent Legislation Demonstrates That Congress Believed That the "Appraisal and Auction" Requirements of the 1910 Enabling Act Were Not Applicable to Mineral Deposits Given to the State in the 1910 Act

When Congress amended the Enabling Act in 1936 the legislative history demonstrates that Congress knew that the nonmineral lands granted in the Enabling Act were not subject to *any* lease provisions. In S. Rep. No. 90, 70th Cong., 1st Sess. 4 (1928) (Appendix Item VI), Secretary of the Interior, Hubert Work, stated: "[B]ut no provision was made in the [Enabling] Act for the development or protection of minerals on state lands." In other words, nonmineral lands that had been granted by the Enabling Act could not be properly leased for minerals. Nor could such nonmineral lands be subject to the lease provisions of the Jones Act: "The provisions of this Act of 1927 would not apply to lands or minerals therein that might be granted under the Act of June 20, 1910." *Id.*⁴

In order to remedy this situation, the 1936 amendments were passed to provide a mechanism for the leasing of such nonmineral lands which contained minerals. See Act of June 5, 1936, ch. 517, 49 Stat. 1477 (providing for the leasing "as the State legislature may direct" of "said lands for mineral purposes"). This amendment did *not* set up a lease system for these lands with an appraisal and auction requirement. It set up a lease system for these nonmineral lands just like the lease system found in the

⁴ Work also discussed what the leasing provisions of the Jones Act were, namely leasing as "the State legislature may direct," the creation of a trust, and a provision for forfeiture. *Id.* Notably absent is any discussion of appraisal or auction.

Jones Act, with the Legislature directing the leasing. Nor did the 1936 Act affect in any way the provisions of the Jones Act. It did not impose any new lease conditions upon the mineral lands granted in the Jones Act. In fact, there is no evidence that Congress found a need or meant to apply the 1936 amendments to the Jones Act mineral lands. Congress simply provided the identical method for all classes of mineral bearing lands: "as the State legislature may direct."

5. A Contemporaneous Reading of the 1936 Amendment Supports Liberal Interpretation of the Jones Act Mineral Leasing Provisions

Furthermore, a contemporaneous reading of the 1936 amendment is provided by the 1940 mineral leasing statute enacted by the Arizona legislature. Long continued and contemporaneous practical interpretations of a statute by the executive officers charged with its administration and enforcement and by the public constitutes an invaluable aid in determining the meaning of a doubtful statute. 2A *Sutherland Statutory Construction* § 49.03; *Edwards' Lessee v. Darby*, 25 U.S. 206, 210 (1827). That statute, Chapter 78, Laws of Arizona, at Section 4(b), established a royalty rate of "five per cent of the net smelter or mint returns." This has been the long-standing law for nearly a half century. It has provided stability to the Arizona mineral exploration and development industries. It has worked well, and is fully consistent with the Jones Act and the 1936 amendments to the Enabling Act. Similarly, the long-established leasing acts of other western states, such as Alaska's leasing system, should be accorded deference.

6. The 1951 Enabling Act Amendments Did Not Affect the Leasing of Nonhydrocarbon Minerals

There is also no evidence that the 1951 Enabling Act amendments, Pub. L. No. 82-44 (1951), had any effect whatsoever on the leasing of any minerals, whether the minerals were on mineral lands originally granted by the Jones Act or nonmineral lands granted by the Enabling Act. The 1951 provision that notes that hydrocarbon leases are exempt from the auction and appraisal requirements of the Enabling Act cannot be interpreted to mean that these requirements were somehow mysteriously affixed to the leasing of minerals found on lands previously granted by the Enabling Act. The 1951 Act dealt with hydrocarbons only. The exploration for and development of hydrocarbon deposits is a very different sort of business compared to hard rock minerals. While both are high risk ventures, the actual mining of hard rock minerals is usually much more capital intensive over the long term. As such, royalty structures differ between the two industries. The 1951 Act did not attempt to cover types of businesses.

7. Related Congressional Legislation Also Supports the Argument That the Enabling Act's Leasing Restrictions Never Applied to Mineral Deposits

Another piece of congressional legislation also supports the assertion that the appraisal and auction requirements do not apply to mineral deposits. In 1922, the New Mexico Supreme Court held that those requirements were not applicable to New Mexico's leasing of its trust lands for mineral purposes. *Neel v. Barker*, 204 P.205 (N.M. 1922). There was, however, some uncertainty over the

vitality of this decision. As a result Congress subsequently passed the Act of February 6, 1928, 48 Stat. 58, which confirmed the New Mexico court's interpretation of the New Mexico-Arizona Enabling Act. Because the question arose with respect to a New Mexico decision, however, the 1928 legislation only referred to conditions in the state of New Mexico. Nonetheless, if Congress did *not* agree with the court's interpretation of the Enabling Act, it would have overturned it, rather than affirming that decision. This is powerful evidence of what Congress intended the language of the Enabling Act to mean.

D. Legislatively Derived Mineral Leasing Systems Provide Maximum Returns to the States

1. Mineral Deposits Do Not Lend Themselves to Appraisal and Auction Requirements

There are fundamental differences between the leasing of buried mineral deposits and the leasing of ordinary land. An appraisal and auction requirement for mineral deposits would be extremely illogical for the leasing of minerals, especially when the value of a mineral deposit cannot be readily determined in advance of exploration, bulk sampling, and testing. An appraisal and auction system would stifle incentives for exploration and development. There is no indication that Congress meant to impose such a system on the leasing of mineral deposits.

Respondents, Kadish, *et al.*, argue that an appraisal requirement for hard rock mineral deposits would not be particularly cumbersome. Yet, the delineation and development of the average hard rock mineral deposit involves the exploration of and rejection of many score other prospects, tens of millions of dollars in exploration,

geophysical, drilling, environmental, and geochemical and beneficiation study costs, and at least a decade of concerted effort. See, e. g., Peters, *Mining and Exploration Geology, passim* (1978). Only after this monumental effort does a mining company know whether or not a deposit is a viable project. Unlike the assessment of a near surface sand and gravel deposit where costs and value can be more or less accurately determined in advance, it is simply impossible to "appraise" the value of a metal or other valuable mineral mine in advance of such exhaustive study. Most significantly, no such exploration and development studies would ever be undertaken in the first place if a mining company could subsequently lose the deposit simply by being outbid at a public auction.

2. The Arizona Legislature Created a Fair and Equitable Mineral Leasing System That Maximizes Returns to the State

Contrary to allegations, Arizona does not "give" away free minerals. It collects hundreds of thousands of dollars from prospecting permits alone and miners spend \$10 to \$20 in assessments per acre.⁵ By calculating the mineral royalty against "net" value, the state provides an incentive to keep income flowing to the state even in times of low mineral prices. This prevents premature mine shutdown and provides continuity in mineral development. For those rare instances where the net value is very low or

⁵ In 1986, this figure was \$303,873, in 1987 the figure was \$172,396, in 1988 it was \$120,471. See letter of Robert Larkin to James Sullivan of November 1, 1988, attached hereto as Exhibit 1. Prospecting permits are issued in accordance with Arizona Revised Statute §§ 27-251, et seq.

zero, the state is still not "giving" away minerals because the value of a mineral cannot be segregated from the unavoidable costs of extracting that mineral.

The legislatures of both Arizona and Alaska distilled their mineral leasing statutes into systems that maximized incentives to develop the state's mineral lands while ensuring a fair return, measured in both direct revenues and gross economic activity to the states. The legislative process is never simple, and it never satisfies all the parties. Nevertheless, because the systems were created "as the State legislature may direct," and because the legislatures have been careful to balance competing interests, any attempt to second-guess these legislative decisions must be carefully scrutinized.

Congress declined to dictate specific leasing provisions for minerals granted under the Jones Act. The only requirement found in the applicable federal statutory law is that the minerals on such lands be leased "as the State legislature may direct." In Arizona the legislature interpreted this to allow it to set up a leasing system with 5% royalties and provisions to reward prospectors with the fruits of their exploration labors. The Arizona provision for a 5% net royalty⁶ lease provides incentive to the development of a small minerals industry for the maximum benefit of the school trust.⁷

⁶ See Ariz. Rev. Stat. § 27-234 (1987).

⁷ In Alaska the state legislature interpreted this to be a broad grant of authority, and the legislature enacted a lease-location provision designed to encourage the exploration and development of mineral resources in Alaska. This had provided a substantial boost to the stated goal in the Alaska Constitution of settling the lands of Alaska while providing an economic base and production license revenues.

The Arizona Supreme Court examined a report from the Arizona Auditor General and decided that if Arizona raised its lease rates, it could gain higher state revenues. The report was flawed. For example, it neglected to account for the differences between different mineral commodities. It neglected to note that states with higher royalty rates often had the lowest overall revenues from mineral leases. The *Kadish* dissent by Justice Cameron recognized some of these fallacies when he noted that “the legislature has properly determined that a fixed-royalty rate appropriately maximizes the revenues to be generated by mineral leases on the school lands.” ASARCO petition appendix at 36a, *Kadish*; 747 P.2d at 1200.

For example, GSA first applied for prospecting permits in 1982 and it has mined some of these leases for industrial minerals since 1986. A substantial commitment of resources has been expended to develop and operate these leases. Continued operation of these leases is crucial to the company’s ability to utilize these investments and quite possibly to its very existence.

In addition to the acres under lease, GSA’s owners have 255.72 acres covered by prospecting permits which it is attempting to convert to leases pursuant to Arizona Revised Statute § 27-254 (Supp. 1987). It has already paid for the right to prospect on this land anticipating that if its exploration efforts were successful, it would have a right to lease the land. GSA would not have pursued any exploration on these lands without assurances that it would also have the right to mine the minerals it had located. Nor could GSA have prudently explored on the state lands without knowing what its royalty payments would be in advance.

Courts are *not* appropriate economic policy decision making bodies. It is not the role of courts to determine what particular leasing scheme will provide for the maximum benefit to the State of Alaska or the school trust of Arizona. The courts are simply ill-equipped to deal with the sort of complex problems that are the province of the state legislative bodies. That is precisely why Congress provided that the leasing systems for mineral lands in the western states should be as the *legislatures* may direct. Congress did not provide any role for the courts to second-guess these legislative decisions.

E. Congress Did Not Intend To Infringe Upon Arizona’s Sovereignty

The creation of the State of Arizona was not a case where the federal government has merely granted a favor or gift to an individual with strings attached, in which the strings must be taken, as the “bitter with the sweet.” *Arnett v. Kennedy*, 416 U.S. 134 (1974). Rather it is a case where the federal government is imposing conditions on one of the most fundamental of attributes of sovereign state government: the state’s right to exercise unfettered jurisdiction over all of its property no matter what the source. The hyperspecific conditions on the leasing of state lands found in the Arizona Enabling Act, as interpreted by the Arizona court, would be repugnant to the concept of independent sovereign state government. The original enabling act restrictions were, perhaps, enacted because of the federal government’s legitimate paternalistic concern over the way certain states managed their lands. This concern, however, does not necessarily justify the infringement on independent state decision making as found in the 1910 Enabling Act.

Fortunately, the issue of the objectionability of the 1910 Act need not concern this Court. Because the Jones Act, rather than the 1910 Enabling Act, governs the disposition of mineral lands, only the much less intrusive conditions of the Jones Act are of concern to mineral lands. The Jones Act wisely left it to the state legislature to establish a mineral leasing system.

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CONCLUSION

The United States Congress gave to the legislatures of the western states the discretion to create their own mineral leasing systems. These systems are designed by the state legislatures to best meet state needs. They are tailored for local concerns. The Arizona Supreme Court incorrectly determined that Congress placed additional strictures on the mineral leasing requirements. This, naturally enough, has implications for a number of western states, not to mention the holders of mineral leases in Arizona and other states.

It is respectfully submitted that this Court should find that the Arizona Enabling Act and the Jones Act do not severely restrict the means by which the State of Arizona can lease its mineral lands. Rather, the decision below should be reversed and the state legislature remain

free to fashion a leasing act that best meets the needs of Arizona's schools.

DATED: November, 1988.

Of Counsel

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Respectfully submitted,
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EXHIBIT 1

App. 1

Arizona
State Land Department

1616 West Adams
Phoenix, Arizona 85007

Rose Mofford
Governor

M J Hassell
State Land Commissioner

November 1, 1988

James P. L. Sullivan
Arcadia Water Company
7009 East Camelback
Scottsdale, AZ

Dear Mr. Sullivan:

In an effort to respond to your recent verbal questions,
the following information is offered:

1. Title 27 of the Arizona Revised Statutes indicates
that our prospecting permit program began in 1961.

2. The 1980 performance audit of this agency by the
office of the Auditor General primarily addresses mineral
royalties, the grazing formula and the issue of trespass.
The only reference to prospecting permit income that I
could find is in Table 3 on page 8 (enclosed).

3. Rental received by the Department from prospect-
ing permits in fiscal year 1986 was \$303,873; in 1987 was
\$172,396; and in 1988 was \$120,471. There were 76, 110
and 98 new prospecting permits issued in each of those
years, respectively. As we discussed, there are currently
386 existing prospecting permits.

Enclosed is additional information regarding the pros-
pecting permit program.

Sincerely,

/s/ Robert Larkin
Robert A. Larkin, Manager
Nonrenewable Resources & Minerals

RAL:ig
cc
Enc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA
COPPER COMPANY, AND JAMES P.L. SULLIVAN,
Petitioners,

vs.

FRANK AND LORAIN KADISH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ARIZONA

MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE IN SUPPORT OF PETITIONERS

AND

BRIEF AMICUS CURIAE OF
CLINTON CAMPBELL CONTRACTOR, INC.
d/b/a PHOENIX BRICK YARD

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November 25, 1988

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No. 87-1661

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION,
MAGMA COPPER COMPANY, AND
JAMES P.L. SULLIVAN,

Petitioners,

vs.

FRANK AND LORAIN KADISH, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF ARIZONA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Movant, Clinton Campbell Contractor, Inc. d/b/a/ Phoenix Brick Yard ("Phoenix Brick Yard"), prays for leave to file the appended Brief Amicus Curiae.

Movant has petitioners' consent to file an amicus brief and it is herewith submitted to the Clerk of the Court. Respondents Kadish, et al., have declined to consent.

MOVANT'S INTEREST

Phoenix Brick Yard is a third generation family-held corporation. It holds leases from the State of Arizona on 23 mining claims situated on state trust lands in southeastern Arizona. The trust lands are in Sections 21, 26, 27, 28 and

35, Township 16 South, Range 17 East. These sections and the undiscovered minerals beneath their surface were not granted or confirmed to the State by either the 1910 Arizona Enabling Act or by the 1927 Jones Act. Rather, they are "indemnity school sections," selected under the 1910 Act in lieu of federally-reserved "mineral" sections or sections that had been otherwise federally preempted.

Movant and its predecessors discovered and perfected movant's mining claims under Arizona's mining law, which is, and always has been, virtually identical to federal mining law.¹ Movant's claims are embodied in four state mineral leases first issued in 1958, 1959 and 1961 for statutorily-prescribed twenty-year terms.

In Tanner Companies v. Arizona State Land Department, 142 Ariz. 183, 688 P.2d 1075 (Ariz. Ct. App. 1984), the Arizona Court of Appeals affirmed the reversal of an administrative decision of the Arizona State Land Department. The Department had found that the Pantano clays being mined by Phoenix Brick Yard and Tanner were "common mineral materials" and not "valuable minerals." Based on this finding, the Department refused to honor the statutory "preferred right to renew" applicable to Arizona mineral leases. It determined that, under Section 28 of Arizona's Enabling Act, "common minerals," like sand, gravel, timber, and other natural products on the surface of state trust lands, were not subject to location and leasing as minerals

¹ Compare Act of May 10, 1872, ch. 152, 17 Stat. 91, *et seq.* (1872) (codified at 30 U.S.C. § 22, *et seq.* (1986)) with Ariz. Rev. Stat. §§ 3231, *et seq.* (1901) (currently Ariz. Rev. Stat. §§ 27-201 through 27-222 (1976, Supp. 1987)). Arizona Revised Statutes §§ 27-231 through 27-238 (1976; Supp. 1987) provide for the discovery, location, and leasing of mining claims on state lands. These statutes incorporate by reference and parallel the mining laws of the United States, but instead of providing for a patent, as does 30 U.S.C. § 29, they provide that a mining claim locator "shall have a preferred right" to a 20-year mineral lease and "shall have a preferred right to renew the lease." Ariz. Rev. Stat. § 27-233 (1976).

under Arizona law, but could be disposed of by the State only after appraisal and advertising and at public auction.²

The Arizona Court of Appeals disagreed. It affirmed a trial court finding that Pantano clays are valuable "minerals," subject to location and leasing. 142 Ariz. 191-192, 688 P.2d at 1083-1084. If Phoenix Brick Yard were deprived of the use of these minerals, it "could not stay in business." *Id.*

Thereafter, the four mineral leases were renewed for twenty-year terms expiring in 1998, 1999 and 2001. They are subject to the five percent royalty requirement prescribed by Ariz. Rev. Stat. § 27-234. The Arizona Supreme Court declared this section void on the ground that it violated Section 28 of the Arizona Enabling Act.

FACTS AND QUESTIONS PRESENTED BY MOVANT

Phoenix Brick Yard's interest and concern are such that, if the Arizona court's decision is correct, its Arizona leases are invalid under federal law. This is so because Arizona law never has required that mining claims be "appraised" at true value before being converted into mineral leases. Nor have Arizona claims or leases in fact been appraised. This lack of appraisal is the very ground upon which the court declared Arizona's royalty statute, Ariz. Rev. Stat. § 27-234, void under federal law.

The court narrowly confines its holding to this single statute. But, if this royalty statute violates Section 28 of

² Arizona's common mineral statutory scheme, Ariz. Rev. Stat. §§ 27-271 through 27-275 (1976), mirrors the scheme prescribed by federal law and required by § 28 of the Enabling Act. Deposits of "common varieties of sand, gravel," *et cetera*, on federal land are not "valuable minerals" and may not be located as mining claims. 30 U.S.C. § 611. Federal law likewise requires that these "common varieties" can be disposed of only to the "highest responsible qualified bidder." 30 U.S.C. § 602.

the 1910 Enabling Act, so also does Arizona's entire mineral leasing regime, because it is barren of any appraisal requirement. If Section 28 requires that a mining claim be appraised before a mineral lease is issued, as held below, then the issuance of a lease *without appraisal* is a patent breach of trust under its second paragraph. Consequently, all outstanding Arizona mineral leases are "null and void" under the eighth paragraph of Section 28, because none of the mining claims embraced in these leases ever were appraised.

If permitted to file an amicus brief, movant will demonstrate:

1. This Court, without the need to resort to the 1927 Jones Act or the subsequent amendments to Section 28 of the Arizona Enabling Act, should determine that the Arizona court's analysis of paragraphs 3 and 4 of Section 28, as originally enacted, is flawed and that its decision must be reversed.

2. The Arizona court's reliance on the 1928 New Mexico amendment and the 1951 Arizona amendment to divine the intent of Congress is wholly misplaced, and the court fails to perceive or articulate the crucial distinction between *non-competitive leases* for oil and gas *exploration* and *competitive (auctioned) leases* for *production* in oil and gas fields.

3. The majority misstates by omission and plainly misconstrues Article X, Section 3, of the Arizona Constitution.

4. The Arizona court ignores the practical and historical realities of exploring, claiming, discovering, and developing subsurface mineral deposits and the virtual impossibility of pre-development appraisal of such deposits.

5. The majority fails to consider or apply congressionally-declared national mineral policy that has

endured for more than 100 years, fails to consider the Arizona mineral policy that has been in place since as early as 1915, fails to give any weight to the construction placed on Section 28 by the People of Arizona and their legislature, and usurps power that the Congress delegated exclusively to the Arizona legislature.

Permitting movant to file the appended Brief will enable it to protect its property rights by discussing the points noted in paragraphs 1, 2, and 3, above. These points have not been raised by the parties. In addition, movant urges that a fuller discussion of the points noted in paragraphs 4 and 5 will assist the Court.

Respectfully submitted,

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November 25, 1988

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

ASARCO INCORPORATED, CAN-AM CORPORATION, MAGMA
COPPER COMPANY, AND JAMES P.L. SULLIVAN,
Petitioners,

vs.

FRANK AND LORAIN KADISH, *et al.*,
Respondents.

On Writ of Certiorari
to The Supreme Court of The State of Arizona

**BRIEF AMICUS CURIAE OF
CLINTON CAMPBELL CONTRACTOR, INC.
d/b/a PHOENIX BRICK YARD**

Clinton Campbell Contractor, Inc. d/b/a Phoenix
Brick Yard ("Phoenix Brick Yard") submits this Brief Ami-
cus Curiae in support of Petitioners.

Introduction

Arizona, like other western land grant states, was organized and admitted to the Union "on an equal footing" with existing states, pursuant to the New Mexico-Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557 (1910) (some-times hereinafter the "1910 Act" or the "Arizona Enabling Act"). The 1910 Act granted the State of Arizona sections 2 and 32, out of each 36-section township of federal land, and confirmed prior territorial grants of sections 16 and 36.

The 1910 Act contained other large grants for specific public and educational purposes.

Congress expressly reserved from the grants, however, sections "or any parts thereof, [that] are mineral." At the outset, then, it is obvious that, contrary to the analysis of the Arizona court, Congress expressed no "intent" whatsoever in the 1910 Act as to any Arizona mineral leasing regime.¹

Section 28 of the 1910 Act provided that the granted and confirmed lands "shall be . . . held in trust, to be disposed of in whole or in part only in the manner as herein provided . . ." (App. 1, par. 1.) It declared that sales, leases or other disposals not made in strict compliance with its provisions shall be a "breach of trust" (par. 2), and that every sale, lease, conveyance or contract not made in conformity with the Act "shall be null and void" (par. 8).

Though the opinion below mentions these provisions, it does not discuss their effect. If, as determined by the Arizona court, short-term leases (referred to in paragraph 3's proviso)² must be "appraised at their true value" (App. 1, par. 4), the issuance of such leases without appraisal is a glaring violation of Section 28, and not only is a "breach

¹ For convenience, relevant portions of the 1910 Act are reproduced as Appendix ("App.") 1 hereto. Section 28 of the 1910 Act contained 10 unnumbered paragraphs. For discussion purposes, *amicus* has numbered each paragraph ("par."). The crucial paragraphs here involved are those numbered 3 and 4. (App. 1, pp. 2a-3a.)

² These short-term leases had five-year maximum terms under the original 1910 Act. (See App. 1, par. 3.) Under the current version of the Act, short-term leases, depending on their purposes, may be issued for maximum terms up to ten or twenty years. New Mexico-Arizona Enabling Act of 1910, ch. 120, 65 Stat. 51 (1951).

of trust" (par. 2), but also renders every Arizona lease so issued "null and void" (par. 8).

The Arizona court's majority seriously misconstrues the plain words of paragraphs 3 and 4 of Section 28.

Interest of Amicus Curiae

Phoenix Brick Yard is the lessee of 23 mining claims located on state trust lands in southeastern Arizona. The trust lands are "indemnity school sections" numbered 21, 26, 27, 28, and 35. These sections were selected under the Arizona Enabling Act in lieu of federally retained "mineral" sections or sections that earlier had been federally preempted. The claims are embodied in four, twenty-year state mineral leases, obtained and issued pursuant to Arizona's mineral leasing law. Ariz. Rev. Stat. §§ 27-231 through 27-238, 27-254 (1976; Supp. 1987). The claims were not appraised prior to leasing.

Arizona's mineral leasing law does not provide, and never has provided, for appraisal of mining claims or mineral exploration permits prior to their conversion to mineral leases.³ Ariz. Rev. Stat. § 27-254 (1976). The Arizona court determined that this failure to require appraisal violated federal law, as set forth in the Arizona Enabling Act, Section

³ Similarly, Arizona's legislature never has required appraisal in connection with the issuance of oil and gas leases. Arizona's legislature promptly took advantage of the Jones Act. Jones Act, ch. 57, 44 Stat. 1026 (1927) (codified as amended at 43 U.S.C. § 870). On November 15, 1927, it authorized oil and gas leases to be issued for *prospecting* (2 years) and for *production* in commercial quantities (5 years, "renewable for succeeding terms of five years each"). Act of November 15, 1927, § 38(g), 4th Spec. Sess., 1927 Ariz. Sess. Laws 207. See App. 3, p. 9a-11a. The 1927 version of the Arizona Enabling Act had no appraisal requirement. Nor did the Arizona legislature impose any appraisal requirement in the State Land Oil and Gas Act of 1939, ch. 87, 1939 Ariz. Sess. Laws 268.

28. But, the court specifically held that *only* the statute relating to rental and royalty payments, Ariz. Rev. Stat. § 27-234, was void. If this determination is not reversed, it is inevitable that the Arizona statutes permitting (Ariz. Rev. Stat. § 27-233) and requiring (Ariz. Rev. Stat. § 27-254) state mineral leases to be issued without appraisal also violate Section 28. In this event, Phoenix Brick Yard's leases, and those of every other Arizona state mineral lessee, are void.

If the Arizona court's holding is not reversed and Phoenix Brick Yard is deprived of the use of the leased minerals, it cannot "stay in business." *Tanner Companies v. Arizona State Land Department*, 142 Ariz. 183, 192, 688 P.2d 1075, 1084 (Ariz. Ct. App. 1984).

Summary of Argument

Phoenix Brick Yard will demonstrate that the majority's construction of the third and fourth paragraphs of Section 28 of the 1910 Act is illogical and incorrect. The third paragraph of Section 28 states in relevant part:

"Provided, That nothing herein contained shall prevent . . . [the] state from leasing any of said lands . . . for a term of five years or less without said advertisement herein required." (Emphasis added.)

The Arizona majority concludes that this leasing proviso applies *only within* paragraph 3. It also finds that because paragraph 4 follows the leasing proviso, paragraph 4's appraisal/true value requirement is independent from the several other dispositional requirements of paragraph 3. Thus, the majority concludes that paragraph 4's appraisal-at-true-value requirement is free-standing, and is not *pari materia* with Section 28's other dispositional requirements.

Significantly, the majority is silent as to the meaning of the clause "without said advertisement herein required"

in paragraph 3's leasing proviso. The court's failure to confront or even discuss the "advertisement" clause is understandable. Had it done so, it could have reached only one of three conclusions concerning Congress' intent with respect to the advertisement clause.

The first possible conclusion is that the clause "without advertisement herein required" eliminates the cumbersome and costly "publication" requirement set forth in paragraph 3. Eliminating the publication requirement, however, would leave intact the "public auction" requirement of paragraph 3. This construction is implausible because it leads to the absurd result that "public auctions" will be conducted without inviting the public to attend and bid. Such auctions would not be "public" and might be attended only by the friends of the auctioneer and the land commissioner.

The second possible conclusion is that the "advertisement" clause, occurring at the end of a complex sentence containing more than 200 words, is nonsensical or meaningless.

The third possible, and most probably correct, conclusion is that Congress used the word "advertisement" as a shorthand way to describe the procedure of offering and disposing of state lands, leaseholds, timber and other natural products. So construed, the "advertisement" clause is given logical meaning, with "appraisal" followed by "publication" and then "auction" as the steps in the overall disposal process.

Even if this Court should agree with the Arizona majority, that the intent of Congress in 1910 was to exempt short-term leases (as distinguished from sales, contracts, leaseholds and other dispositions) from all of Section 28's dispositional requirements except the appraisal requirement, this 1910 intent cannot be resurrected and applied

to present Arizona mineral leases.⁴ To do so would frustrate the purpose of the Jones Act, and would be contrary to Congress' objectives in amending Arizona's Enabling Act in 1936 and again in 1951.⁵

The court below concludes that the appraisal/true value requirement of the 1910 Enabling Act is contrary to and takes precedence over the specific words of the Jones Act. To buffer this conclusion, the majority purports to derive Congress' intent from its role in 1928 in allowing New Mexico to amend its constitution, and from its actions in 1951 in amending Section 28 of Arizona's Enabling Act.

The Arizona court, in both instances, relies on language that was conceived and written in Santa Fe and Phoenix, not in Washington. Congress rubber-stamped *in haec verba* leasing language written and adopted by New Mexico's legislature in 1927 and leasing language written and adopted by Arizona's legislature in 1950. Nevertheless, the Arizona court infers broad congressional purposes and detailed intent from language that Congress did not write.

The court's reliance on the purported role played by Congress in framing the 1928 (New Mexico) and 1951 (Arizona) oil and gas leasing amendments to the Enabling Acts

⁴ It is impossible to read the reports of the proceedings that led to the enactment of the Jones Act without concluding that the congressional distrust of the states and their legislatures, that was so apparent in the 1910 proceedings, had vanished before the Jones Act was adopted in 1927 and Congress authorized amendment of the New Mexico constitution in 1928. The latter proceedings and those that followed in 1936 and 1951 reveal that Congress completely trusted the state legislatures to act in the best interests of their respective states in leasing minerals on trust lands as they "may direct."

⁵ As discussed below, Congress' 1951 amendment to the Arizona Enabling Act was drafted by the Arizona legislature in 1950.

is entirely misplaced. As shown below, this misplaced reliance stems from the court's utter failure to grasp the crucial and dispositive distinction between the *practical necessity* for issuing non-competitive oil and gas *exploration leases* *without appraisal, bidding or auction requirements*, and the vital *legal necessity* for issuing oil and gas *production leases* in known fields *only after competitive bidding or at auction*.

The majority below seemingly rejects the plain edicts of the 1927 Jones Act and the 1936 amendment to Arizona's Enabling Act. Both of these statutes reveal the plainly written intent of Congress to vest mineral leasing power and discretion exclusively in the Arizona legislature.

The court also ignores or misconstrues numerous Arizona statutes, and misstates by omission Article X, Section 3 of Arizona's constitution. Almost 40 years ago the legislature and People of Arizona ordained that the leasing proviso of Section 3 of Article X (Section 28, paragraph 3 of the Enabling Act) did in fact apply to Article X of Arizona's constitution (Section 28 of the Enabling Act) *in its entirety*. See App. 9, p. 27a. This squarely contradicts the Arizona court's determination that paragraph 3's leasing clause *must* be confined to that paragraph. The Arizona constitution's words "or elsewhere in Article X contained" cannot be reconciled with the lower court's holding that Ariz. Rev. Stat. § 27-234 violates Arizona's constitution.

ARGUMENT

The Appraisal, Advertising, and Auction Requirements of Section 28 Are Not and Never Were Applicable to Short-Term Leases.

The Arizona court's holding is founded entirely upon its erroneous conclusion that Congress intended, in 1910, that leases of Arizona trust land for short terms of "five

years or less" (App. 1, par. 3) "before being offered, shall be appraised at their true value" (App. 1, par. 4).

If this was not the intent of Congress⁶, or, if within the four corners of Section 28 it is plain that the words "nothing herein contained" (par. 3) refer to *all of Section 28 and not just its third paragraph*, then the majority's analysis is invalid and its decision must fall like a house of cards.

The placement of the appraisal-at-true-value requirement (par. 4) after the short-term leasing proviso (par. 3) may have been nothing more than a drafting fortuity. The lengthy, compound sentence that precedes the leasing proviso contains about 175 words. Yet, the reasoning of the three-fifths majority of the Arizona court is based on the placement of Section 28's various dispositional requirements, the last of which happens to be the appraisal/true value requirement. In fact, the court stresses the point that the Section 28 language regarding appraisal and true value (par. 4) "follows" the leasing proviso (par. 3). 155 Ariz. at 492, 747 P.2d at 1191.

The Arizona court's reasoning requires that the appraisal/true value requirement (par. 4) be treated as a free-standing provision unrelated to the notice, publication and auction requirements of the preceding paragraph 3. The frailty in this reasoning is that it does not take into consideration the phrase "without said advertisement herein required" that is contained in the 1910 leasing proviso. Once again, Congress used the term "herein."⁷

⁶ One construction of the 1910 version of Section 28, more logical than the one placed on it by the Arizona court, is that a short-term lease is not a "sale or other disposal" of trust land. Another such construction is that a lease for a term of less than five years does not constitute an "offer" in the sense this word is twice used in paragraph 3 and once used in paragraph 4.

⁷ Beginning with Section 19 of the 1910 Arizona Enabling Act, and throughout the 1910 Act, Congress used the words "herein con-

It is understandable that the Arizona court does not address the "advertisement" clause. By the court's procrustean reasoning, the word "advertisement" can refer only to the publication requirement, which precedes the "advertisement" clause in paragraph 3. The word "advertisement" surely cannot be stretched to include the auction requirement, and the holding of a "public auction" still is necessary. Obviously, such reasoning leads to an absurd result. Before being offered, a two-year grazing lease would have to be "appraised at true value," but then sold at public auction without any notice or publication. Such an auction might be attended only by a few "insiders," thus reducing the number of bidders from which the "highest and best bidder" must be selected.

Congress could not have intended this result. Congress must have used the word "advertisement" as a shorthand way to describe the entire procedure of offering and disposing of trust assets. No other reading makes sense. It makes even less sense for the Arizona court to construe the "nothing herein contained" in the leasing proviso in paragraph 3 as if it read "nothing *hereinabove* contained."

Because Section 28's paragraphs are interrelated and must be considered *pari materia*, the acid test to determine the validity of the court's reasoning is simply to transpose the "breach of trust" provision (par. 2) and the "appraisal at true value" provision (par. 4); or move paragraph 3's leasing proviso to follow paragraph 4. If this is done, it becomes clear that appraisal is a mere step (as it should be)

tained," "herein provided," "hereinbefore provided," "hereinafter fixed," and "herein." These words and references often apply to the entire Act. In *some instances* they refer to subjects (e.g., elections) that are covered in several sections. In *every instance* they apply or relate to the section of the Act in which they appear. In *no instance* can their meaning be logically or reasonably confined to a single unnumbered paragraph of a section, much less to one sentence within a paragraph. Yet, the lower court rigidly confines the meaning of the words "nothing herein contained" in paragraph 3's leasing proviso to a single sentence of that paragraph.

in the offer-disposition process. The need for a pre-disposition appraisal is dictated by the realities of an auction.⁸

The 1910 language following the appraisal/true value requirements in paragraph 4 of Section 28 of the Enabling Act⁹, makes it plain that Congress intended appraisal to be a prerequisite of offer and sale. The 1910 Congress was so concerned about prior "giveaways" of school lands that it employed a "belt and suspenders" approach. It added the requirement that "no lands shall be sold for less than three dollars per acre" and no irrigable lands for "less than twenty-five dollars per acre" in paragraph 5 of Section 28. (App. 1, p. 5a.) Congress thus placed a statutory "floor" under any appraisal that might be made and any bid that might be submitted at a public auction.¹⁰

The Arizona court's construction of paragraphs 3 and 4 of Section 28 of the 1910 Act cannot withstand reasonable scrutiny. An Arizona two-year grazing lease did not have to be appraised before it was offered in 1912. Neither did a twenty-year mineral lease, before it was offered in 1952 or 1982.

⁸ For example, if a tract of valuable land were offered for sale at auction, it would be downright imprudent for its owner to permit bidding to start at \$1.00. Moreover, if the land was held in trust, and the trustee permitted such bidding, his conduct well could constitute a breach of trust.

⁹ "... and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained . . ."

¹⁰ Congressional mistrust of the management of school trust lands by states and their legislatures was most evident in the hearings, reports, and debates that preceded enactment of the Arizona-New Mexico Enabling Act in 1910. It is no less evident from these same sources that by the time the Jones Act was passed, this congressional mistrust had disappeared. In the 1936 amendment of Arizona's Enabling Act, Congress eliminated the three dollar and twenty-five dollar per acre purchase price minimums. It also eliminated from the leasing clause of Section 28 the words "without said advertisement herein required."

The Arizona Court's Decision Disregards the Meaning and Purpose of Both the 1927 Jones Act and the 1936 Amendment of Arizona's Enabling Act.

When Congress enacted the Jones Act, ch. 57, 44 Stat. 1026 (1927), (codified as amended at 43 U.S.C. § 870), it intended (and repeatedly so avowed in its proceedings) to place Arizona and the other western land grant states on an equal footing *inter se* and with the other land grant states. Subject only to then-existing mining claims and other outstanding federal claims and rights, Congress enlarged prior grants of numbered sections 2, 16, 32 and 36 to embrace sections with these numbers that had been excluded from the prior grants because they were "mineral in character." It transferred to these western states title to and sovereignty over the previously-reserved mineral sections. Plenary leasing power was expressly vested in the state legislatures.

Congress envisioned that each state legislature would adopt a mineral leasing and royalty regime, because it forbade the sale or patent of "coal and other minerals," and broadly granted each state the power to lease "coal and other mineral deposits . . . as the State legislature may direct."

Congress also required that the "royalties" from mineral leases must be "utilized for the support or in aid of the common or public schools." The Arizona court ignores the words last quoted. It overlooks the fact that the Jones Act deals with mineral leases and relies entirely on the fourth paragraph of Section 28 of the 1910 Arizona Enabling Act to derive the "mineral leasing" intent of Congress in the 1927 Jones Act. The court also characterizes the Jones Act as a mere "amendment" to the Arizona Enabling Act. 155 Ariz. at 490, 491, 747 P.2d at 1189, 1190.

Arizona's Enabling Act was in fact amended in 1936. This amendment, unlike the later 1951 amendment, originated in Congress, not with the Arizona legislature.

In 1936, Arizona owned a large amount of federally granted land that was *not* located in sections 2, 16, 32 and 36 (e.g., all five of the sections on which Phoenix Brick Yard's mining claims were located).

None of these sections fell within the purview of the Jones Act's grant. Thus after 1927, Arizona was permitted to issue mineral leases in any manner "as its legislature may direct," but only if the land was located in sections 2, 16, 32 or 36. As to granted land situated in the other 32 sections (%) of each township, Arizona, under its own laws of 1915 and 1927 (App. 2 and 3 hereto), could issue mineral leases, but only for a term of five years, or less, to conform with Enabling Act § 28, par. 3.

Prior to 1936, in congressional contemplation (though Congress doubtless knew otherwise), the 1920 Act had not granted to Arizona any mineral lands that could be leased.

By its plain words, the 1936 amendment to Arizona's Enabling Act was and had to be intended to place all of the land previously granted to the Territory and State of Arizona on equal footing.

The amendment granted the power to issue mineral leases for terms of 20 years or less. Congress, *using exactly the words it used in the Jones Act*, vested the power to lease "as the state legislature may direct." The choice of the identical words was no accident. It ensured, for the purpose of mineral leasing, that all lands granted previously, whether lien lands, indemnity lands or quantity grant lands, would be treated the same as those granted by the Jones Act.

As it related to mineral leasing, the 1936 Arizona Enabling Act amendment was a reenactment of the Jones

Act that applied to all previously granted land not situated in sections 2, 16, 32 or 36.

Through its tortured construction of the third and fourth paragraphs of Section 28 of the 1910 Act (which had nothing whatever to do with minerals or mineral leases), the Arizona court erroneously rejects the Jones Act's grant of sovereignty over "mineral" lands to the states, and contravenes congressional will to place the states on an "equal footing." The decision, by disregarding binding federal law, subverts Congress' grant of authority to Arizona's legislature to lease mineral deposits under state land as it "may direct;" a grant that was expressly reiterated by Congress in 1936.

Congress' objectives in enacting the Jones Act were to divest federal control over vast mineral deposits and to place that control in the state legislatures. The need for this transfer resulted from the extreme difficulty of determining which lands were "mineral in character." This "difficulty" in the western land grant states had resulted in chaos in land titles leading to much vexatious litigation, and had frustrated mineral location and exploitation. If the very character of *mineral* land cannot feasibly be determined, how can subsurface minerals be appraised?

The irony and weakness of the Arizona court's reasoning is that it brushes aside the very historical and legislative premise on which the Jones Act is founded. The majority simply assumes that mineral lands can be identified in advance for leasing. It further unsupportedly assumes that unexplored and undeveloped subterranean mineral deposits can be appraised in advance of exploration and development.

This Court should preserve the law's noble claim to reason by rejecting such artificiality.

Phoenix Brick Yard adopts the petitioners' more complete analysis of the Jones Act and the events and proceedings that led up to its passage.

The Arizona Court Misreads the 1928 Joint Resolution Affecting New Mexico and Misinterprets the 1951 Amendment to the Arizona Enabling Act.

The Arizona majority places much emphasis on congressional Joint Resolution No. 7, 45 Stat. 58 (1928), which approved New Mexico's proposed constitutional amendment to give that state broad latitude to enter leases and contracts "for the development and production of any and all minerals . . ." The court relies on this language, and the fact that the "1928 Resolution applied solely to New Mexico and did not mention Arizona at all," to support its conclusion that, in 1928 "Congress was quite aware of just how to give states the right to make mineral leases without meeting the appraisal or true value requirements of the Enabling Act." 155 Ariz. at 491, 492, 747 P.2d at 1190, 1191.

The problem with this approach is that the language that the Arizona court deems so "important" to its analysis was written in Santa Fe, not Washington. Excluding its formal parts, the February 6, 1928 congressional Joint Resolution is a *virtual word-for-word copy*¹¹ of the amendment that was written and enacted by the New Mexico legislature almost one year earlier. Compare Joint Resolution No. 7, 45

¹¹ Only two changes were made in Congress. See Appendices 5 and 6 hereto. A typographical or transcription error was made in the title. The word "protection" was substituted for the word "production." That the change was a mere error is borne out by the fact that the word "production" remains in the operative portion of the act. The other change consisted of the capitalization by Congress of the word "state." These trivia are the sum total of the role of Congress in writing or drafting the New Mexico amendment.

Stat. 58 (1928) (App. 6) with New Mexico H. J. R. 8, 1927 N.M. Laws 485 (App. 5).¹²

The record is clear beyond dispute that when the New Mexico resolution was before Congress, approval of the amendment to the New Mexico Constitution was viewed only in the New Mexico context. There was no discussion concerning whether similar problems had developed and should be solved in Arizona or any other state. See S. Rep. No. 90, 70th Cong., 1st Sess. (1928); H.R. Rep. No. 332, 70th Cong., 1st Sess. (1928); 69 Cong. Rec. 1517-18, 2094-95 (1928). New Mexico's legislature and its people were not looking beyond their border to solve problems in Arizona. Nor was Congress.

The actions of Congress in connection with the New Mexico amendment scarcely disclose any strong or clear intent of any kind, much less an intent that focused on the appraisal requirement of Section 28 of the Enabling Act. Nor is there any indication that Congress recalled the 1928 New Mexico resolution, which it did not write, when it later considered an amendment to Arizona's Enabling Act in 1936. See 155 Ariz. at 492, 747 P.2d at 1191.

The Arizona majority similarly and erroneously relies on the 1951 amendment to the Arizona Enabling Act to ascribe an intent to Congress that Congress could not have had.¹³

As can be seen by comparing Appendices 8 and 11 hereto, the only "intent" displayed by Congress as to the 1951 amendments related to added clause 4. This clause

¹² The constitutional amendment was adopted by the citizens of New Mexico at a general election held on November 6, 1928.

¹³ The court's discussion of the 1928 New Mexico resolution and the 1951 Arizona Enabling Act amendments, along with its repeated declarations of the intent and purpose of Congress are found at 155 Ariz. at 491-492, 747 P.2d 1190-1192.

had nothing to do with the issuance of leases; rather it protected the value of improvements made by a former lessee and required the successor lessee to pay for such improvements. The reference to Article X of the Arizona Constitution was stricken because it could make no sense in a congressional context. The words "without advertisement" were stricken in two places for the obvious reason that Congress had previously eliminated these words in its 1936 amendment of Section 28. This action in and of itself is contrary to the congressional intent found by the Arizona court.

From the Arizona amendment the court finds "congressional intent," "congressional belief," what Congress "did not intend," what "Congress intended," and what "Congress showed." The Arizona court repeatedly characterizes congressional action as to oil and gas leases as "removing" dispositional restrictions, "freeing" the states of these restrictions, or granting "unrestricted" leasing authority. *Passim.*

After describing the 1951 Arizona changes as "most dramatic revisions," the court says that by the 1951 Arizona amendment:

"Congress specifically removed the appraisal, bidding, and advertising restrictions of § 28, but *only* as they applied to leases of oil, gas and other hydrocarbon substances." 155 Ariz. at 493; 747 P.2d at 1192 (emphasis in original).

The Arizona court further declares:

"Significantly, just as it had with 1928 Joint Resolution No. 7 pertaining only to New Mexico, in the 1951 amendment Congress again showed that when it wished to permit the state unrestricted authority to lease it would do so explicitly." *Id.* (emphasis added).

The quoted statements are incorrect. First, neither Congress nor any of its committees took any part in the crafting or drafting of the salient language contained in either the New Mexico resolution or the Arizona amendment. Any beliefs, intents or purposes exhibited by the Congress could have been founded only on language that had been written and already was enacted in New Mexico and Arizona. Second, neither the New Mexico resolution nor the Arizona amendment "removed" dispositional restrictions or granted "unrestricted" leasing authority.

Like the Joint Resolution that permitted New Mexico to amend its Constitution which was drafted in New Mexico, the 1951 amendment to the Arizona Enabling Act was drafted in Arizona more than a year before Congress acted on June 2, 1951. See App. 8. As a matter of fact the People of Arizona on September 12, 1950 also approved the amendment.¹⁴ See App. 9, p. 29a.

Instead of removing restrictions or granting unrestricted leasing power, Congress approved state-written measures which gave the Arizona and New Mexico legislatures the option *to advertise or not to advertise* oil leases. The Arizona court's failure to comprehend the legal and practical necessities for this option leads to the collapse of its analysis.¹⁵

¹⁴ The legislature of Arizona must have regarded congressional approval as a forthcoming formality. In March, 1951 it adopted an oil and gas act consistent with the prior amendment. See App. 10 hereto. This act contained *no* appraisal or advertising requirements for the issuance of non-competitive exploration leases, but production leases could be issued *only* after statewide publication and upon receipt of sealed bids.

¹⁵ Without assuming that congressional recall and intendment are everlasting and infallible, as does the Arizona court; but only assuming that they can "endure the seasons," the New Mexico and Arizona leasing proposals would not have provoked controversy or even debate in Congress. The "option" oil and gas leasing concept was "old hat" to Congress. The oil and gas leasing Act of February 25, 1920, 41 Stat. 441, and later federal acts have included the concept of issuing unadvertised prospect-

Appraisal or advertising prior to the issuance of an oil and gas *exploration lease* would be as futile and meaningless as the appraisal or advertising of an unexplored and undeveloped mining claim prior to the issuance of a mineral lease. A mining claim can be located by digging or boring a hole in the ground and erecting some rock piles three feet high or some posts four feet high. What is the value of a hole in the ground? Even if the rock or aggregate taken from the hole had some showing of the presence of valuable minerals, what legitimate trust purpose could appraisal or advertising serve? The same is true of oil and gas exploration leases or permits, except that there is no hole in the ground. A lease or permit is required before drilling occurs.

The exact opposite is true with respect to oil and gas production leases. Advertising, with bidding or auction, are required. If the legislatures of New Mexico or Arizona enacted a statute that permitted the issuance of an oil and gas production lease by negotiation, or without advertising and competitive written bidding, or at public auction after notice, such a statute would be a breach of trust and a violation of the Enabling Act.

The Arizona court, by its convoluted analysis of paragraphs 3 and 4 of Enabling Act § 28, has erroneously concluded that, as written in 1910, the appraisal-at-true-value requirement of paragraph 4 stands apart from the other dispositional requirements of § 28. The Arizona court uses this same faulty analysis to defeat the mineral leasing objective of Congress in enacting the Jones Act and in amending the Arizona Act in 1936.

As the clincher to its conclusion, the Arizona court invokes *Alamo Land & Cattle Co. v. Arizona*, 424 U.S. 295 (1976), as a dispositive holding by this Court. 155 Ariz. at 494-95, 747 P.2d at 1193-94.

ing permits (exploration leases) on a first-come, first-served basis, but issuing production leases only after full-blown notice or advertising and only to the highest and best or most responsible bidder.

This Court did indeed say that a short-term Arizona grazing lease must be appraised at true value, before being offered, as is *facially indicated* by Arizona Enabling Act § 28, par. 4 (424 U.S. at 304-307).

Alamo did not involve a mineral lease and this Court had no reason to consider either the 1927 Jones Act's grant of mineral leasing authority or the virtual reiteration of that grant made by Congress in the 1936 amendment to Arizona's Enabling Act.

Alamo's rationale should not be applied to mineral leases. *Amicus* will leave to the parties and the Court the matter of whether the Court's *Alamo* language is *obiter* or a holding of the Court. If *Alamo* holds that short-term Arizona state grazing leases must be appraised at true value, before being offered, *Amicus* respectfully suggests that *Alamo* is wrong for the reasons set forth above (pp. 7-10), and the opinion should be reexamined.

The Arizona Court Overlooks the Legislative Construction Placed on Section 28 since 1915 and Ignores National Mineral Policy.

All Arizona courts, including its highest court, are bound by rules that provide that courts do not legislate. The most fundamental rule of statutory construction is that the court shall ascertain, and give effect to, the true intent of the legislature at the time that it enacted a statute. E.g., *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *Kriz v. Buck-eye Petroleum Co., Inc.*, 145 Ariz. 374, 701 P.2d 1182 (1985). In determining what construction to place on a statute, legislative intent is controlling. E.g., *Philbrook*, 421 U.S. at 713; *State v. Weible*, 142 Ariz. 113, 688 P.2d 1005 (1984).¹⁶

¹⁶ Whether or not Arizona's supreme court, in deciding an issue of federal law, is bound by the Arizona legislature's repeated interpretation of that law, judicial prudence would suggest that the court should

In 1915, the Arizona legislature acted in response to the authority delegated to it by Congress in the 1910 Enabling Act. Short-term surface leases and mineral leases were authorized without appraisal. It acted again in 1927 in response to the authority Congress delegated in the Jones Act. See Apps. 2 and 3.

These responses by the Arizona legislature demonstrate its *contemporary* understanding of the nature and scope of the authority and responsibility conferred upon it by Congress. The contemporary construction of a statute, by the governmental branch charged with its administration, is obviously entitled to great weight in arriving at a proper interpretation of Congress' intent. Cf., *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977). In the present case, however, the Arizona court does not even mention these and other actions of the Arizona legislature, or its unvarying interpretation of Section 28 of the Enabling Act.

An examination of the law adopted by Arizona's legislature in 1915, Act of June 26, 1915, 2d Spec. Sess., ch. 5, 1915 Ariz. Sess. Laws 13 (see App. 2), reveals that the legislature well understood that Arizona was receiving and selecting land under the Enabling Act that was, in fact, mineral in character. This occurred in all the land grant

at least look at that interpretation. This is especially true when, as in this instance, Congress in successive enactments has expressly delegated to the state legislature the discretion and duty to carry out a federally-mandated power in such manner "as the legislature may direct" or "prescribe." It is another matter for the court to disregard the Arizona Constitution. In 1950, Arizona's People adopted an amendment to Article X of its Constitution, the cognate Arizona counterpart to Section 28 of the Arizona Enabling Act. Section 3 of Article X is the Arizona cognate of paragraph 3 of Enabling Act Article 28. Compare App. 9, p. 27a and App. 11, p. 36a. If paragraph 3 read "nothing herein or elsewhere in Section 28 contained," the Arizona court's determination that paragraph 3 must be read apart from other paragraphs would be utterly invalid! It is, to say the least, surprising that the Arizona court did not discuss or even mention this language in § 3 of Article X, even if the court had rejected it as having no precedential effect on an issue of federal law.

states, and stemmed from the difficulty or impossibility of determining the mineral character of land from a surface examination. This Court addressed a phase of that problem in *Wyoming v. United States*, 255 U.S. 489 (1921).

In the 1915 statute, the Arizona legislature enacted a mineral leasing scheme for state land that reaffirmed the federal procedure for locating mineral claims, and, among other things, gave claim locators a preferred right to lease, provided for five dollars rental per claim, for a two-year lease, (without advertising or appraisement) and limited ore production to fifty tons until a royalty contract was executed (without advertising or appraisement) by the locator and the State Land Department.

Under the lower court's reasoning, Arizona's 1915 mineral leasing statute would have violated the appraisal requirement of Section 28. The 1915 statute was never challenged.

Shortly after Congress enacted the Jones Act in 1927, the Arizona legislature acted to accept the benefits of that Act. Although the present Arizona court fails to recognize the objectives of the Jones Act, Arizona's 1927 legislature clearly did. It immediately reenacted subsections (a) through (f) of Section 38 of the 1915 enactment *in haec verba*.¹⁷ Act of November 15, 1927, 4th Spec. Sess., ch. 24, Ariz. Sess. Laws 207 (App. 3). There can be no clearer evidence that the Arizona legislature understood that Congress intended by the Jones Act that "coal and other mineral deposits . . . shall be subject to lease by the State as the State legislature may direct." No other explanation exists for the word-for-word reenactment of Section 38.

¹⁷ Section 38(b) of the 1927 version of the act omitted a clause contained in section 38(b) of the 1915 version of the act. The omitted clause gave citizens, who had found minerals on unsold state land prior to the passage of the act, 90 days within which to apply to the state for a lease (See Apps. 2 and 3).

Unlike New Mexico's 1927 legislature, Arizona's 1927 legislature interpreted the Jones Act to confer upon the states the right to issue leases for all minerals, including oil and gas. For this reason, the only changes the Arizona legislature made to Section 38 of the 1915 act (App. 2) were addition of subsection (g), and deletion of the clause referred to in note 17.

In subsection (g), the legislature authorized oil and gas "prospecting leases" and "development and operating leases" with differing terms and provisions. It also specified a 12½ percent royalty on any oil and gas that was commercially produced. Once again, the Arizona legislature did not construe Section 28 of the Enabling Act to require in this context advertisement or appraisal. It took Congress at its word when it said in the Jones Act that mineral deposits "shall be subject to lease by the State as the State legislature may direct." See App. 3.

Arizona's present mineral leasing law, Ariz. Rev. Stat. §§ 27-231 through 27-238, is set forth in Appendix 4. The Arizona legislature's current perception of the meaning and effect of both the Enabling Act and the Jones Act is clear from this law. Section 27-234, of course, is the provision declared void by the opinion below.¹⁸

¹⁸ The Arizona legislature's 1961 enactment, providing for mineral prospecting permits, is additional evidence of its sensitivity to the need for mineral exploration and development. Ariz. Rev. Stat. §§ 27-251 through 27-256 provide for exclusive one-year prospecting permits on state land, renewable for five years. Advertisement or bidding are not required. This allows and encourages large-scale exploration, the *quid pro quo* for which is the *mandatory* issuance of an Arizona mineral lease on any minerals discovered and developed within the permitted area. Ariz. Rev. Stat. §§ 27-254 ("... the commissioner shall issue a mineral lease . . ." (1976) (*emphasis added*)).

¹⁹ Further evidence of the state legislature's understanding of the Enabling Act is revealed by Arizona's statute relating to the disposition of common mineral materials and products. This act, first adopted in 1967, now appears in Ariz. Rev. Stat. §§ 27-271 through 27-275. The

The Arizona court ignores almost a century of Arizona legislative history. Congress' grant of leasing power was made to Arizona's legislature. Nevertheless, the majority below fails to discuss Arizona's mining laws or to consider the construction placed on the relevant federal acts by the Arizona legislature. The court also neglects to consider the national mineral policy.

A clear exposition of the early national mineral policy is set forth in H.R. Rep. No. 730, 84th Cong., 1st Sess., reprinted in 1955 U.S. Code Cong. & Admin. News 2474. The report points out:

"Mineral resource utilization comes about only after: (1) prospecting; (2) exploration; and (3) development.

Historically, the Federal mining law has been designed to encourage individual prospecting, exploration, and development of the public domain. The incentive for such activity has been the assurance of ultimate private ownership of the minerals and lands so developed. Under these laws, prospectors may go out on the public domain not otherwise withdrawn, locate a mining claim, search out its mineral wealth and, if discovery of mineral is made, can then obtain a patent. The property, with issuance of patent, becomes the individual's to develop or sell, according to his initiative or desire." 1955 U.S. Code Cong. & Admin. News at 2476.

Similarly, the Mining and Minerals Policy Act of 1970, Pub. L. No. 91-631, 84 Stat. 1876, provides:

statute provides in part that no common mineral materials or products will be disposed of at "less than the true appraised value." The regulations supplementing the act permit disposal of common mineral products only at public auction.

"The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, . . ."

House Report No. 1442, 91st Cong., 2d Sess., reprinted in 1970 U.S. Code Cong. & Admin. News 5792, points out the need for a mineral policy:

"There appears to be little argument about the need for a broad national minerals policy to guide both the Federal Government and private industry with respect to this Nation's long-range minerals position. Ours is more and more a mineral-based economy and whether viewed as a part of a peacetime economy or as a necessary mobilization base in times of emergency, the future well-being and national security of our Nation is directly tied to the supply and availability of minerals." 1970 U.S. Code Cong. & Admin. News at 5793.

Any federal grant of school lands to the State of Arizona must be viewed in light of the mining laws, the school trust laws, and public mineral policy. *United States v. Sweet*, 245 U.S. 563, 38 S. Ct. 193, 195 (1918) (where a statute granting school lands to Utah failed to state whether mineral lands were excepted, the grant had to be "read in the light of the mining laws, the school land indemnity law, and the settled public policy respecting mineral lands, and not as though it constituted the sole evidence of the legislative will"). *Id.*

When Congress enacted the Jones Act and later amended Arizona's Enabling Act, it did so against the backdrop of the national mineral policy, which was and is intended to promote mineral exploration and production. The Arizona court gave no consideration to this policy.

CONCLUSION

The Arizona court's opinion is more incorrect and its reasoning more invalid for what it assumes and fails to say, than for what it does say. The court simply assumes that an unexplored or undeveloped mining claim can be appraised like a parcel of land, a 99-year leasehold, or a surface deposit of sand or gravel. The court's assumption is as unreal as its assumption that oil and gas leases can or should be issued without advertising or bidding. Here again, in the process of its reasoning to support its tenuous construction of paragraphs 3 and 4 of the 1910 Act, the court is oblivious to the real life, economic differences between oil and gas *exploration* leases and oil and gas *production* leases.

As shown above, the majority's strained reading of paragraphs 3 and 4 of Section 28 of the 1910 Act does not withstand scrutiny. The majority's analysis of Congress' motives, in passing the Jones Act and twice amending Section 28, is even more unrealistic and invalid.

For aught that appears in the opinion below, the only role played by Arizona's legislature since 1912 with regard to mineral leasing on school trust land was its enactment of a statute containing an invalid royalty provision. This clearly is not true. A most cursory examination of Arizona legislative history reveals that, *unlike its supreme court*, Arizona's legislature

— was fully aware of the practical realities that affect hard rock mineral discovery and location and oil and gas exploration, leasing, and development;

— well understood the infeasibility of appraising or auctioning undeveloped subsurface mineral deposits and undiscovered oil and gas, but also knew that leases in proven oil and gas fields *must be issued only to the highest bidder*;

— was fully cognizant of national mineral policy and federal mining law, which it has engrafted into Arizona law since statehood;

— was immediately sensitive to the broad grant of power made to it by the 1927 Jones Act that authorized the leasing of mineral deposits, including oil and gas;

— understood at all times (as did the People of Arizona) that the leasing proviso of paragraph 3 of Section 28 of the Enabling Act applied to *all* of the other terms and provisions of Section 28 and not just to paragraph 3 itself.²⁰

The opinion of the Arizona court has an appealing patina, but lacks judicial substance. It appears to have been written in a vacuum. It is as if the majority first reached the legislative conclusion that the 5% net royalty rate is too low and must be raised, and then searched for judicial grounds to justify it.

The court's economic analysis simply assumes that a substantial public educational gain will result from

²⁰ Indisputable evidence of the Arizona legislature's interpretation of this leasing proviso appears in the act passed by the legislature on March 14, 1950, Act of March 14, 1950, 1st Spec. Sess., 1951 Ariz. Sess. Laws 483. See Appendix 8. By vote of the People of Arizona on September 12, 1950, this statute became Section 3, Article X of the Arizona Constitution. On June 2, 1951, Congress rubber-stamped the new leasing proviso. It struck the clause "or elsewhere in Article X" because that clause obviously lacked a federal statutory context. More than 38 years have elapsed since this verbal hiatus was created. Neither Arizona's legislature nor its People have sought to change or delete the "or elsewhere" phrase. (See App. 9, p. 27a and App. 11, p. 36a.)

"appraisal" of undeveloped mining claims to determine their "true value" in order to fix the price of a mineral lease.

If the decision of the Arizona court is left standing, the opposite may well prove true. What prospector would blunt his pick or dull his diamond drill on Arizona trust land merely to acquire the privilege of having his claim appraised by a state agent? The answer is, there is none. Instead, he would simply move to the next section or township or state and prospect on federal or non-Arizona land. If he located an economically productive claim on federal land, or on the school trust lands of another western state, he could obtain an outright patent or a mineral lease for a few dollars.

For the foregoing reasons, and those stated in the Brief for Petitioners, the decision of the Arizona court should be reversed.

Respectfully submitted,

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November 25, 1988

Appendix 1

Note: All underlining added.

Excerpts from Act of June 10, 1910, ch. 310, 36 Stat. 557, 568, 572, 574 and 575 (Arizona Enabling Act)

"CHAP. 310. — An Act . . . to enable the people of Arizona to form a constitution and state government and be admitted into the Union on an equal footing with the original States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, . . .

* * *

"SEC. 19. That the qualified electors of the Territory of Arizona are hereby authorized to vote for and choose delegates to form a constitutional convention for said Territory for the purpose of framing a constitution for the proposed State of Arizona. . . ."

* * *

"SEC. 24. That in addition to sections sixteen and thirty-six, heretofore reserved for the Territory of Arizona, sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act are hereby granted to the said State for the support of common schools; and where sections two, sixteen, thirty-two, and thirty-six, or any parts thereof, are mineral, . . ."

[Selections in lieu of mineral lands authorized by Congress] (brackets added).

* * *

[par. 1] "SEC. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified. . . . and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

[par. 2] Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom . . . in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

[par. 3] . . . Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: Provided, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

[par. 4] All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained. . . ."

*** * ***

[par. 8] "Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

[par. 9] It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

[par. 10] Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen hereof to enforce the provisions of this Act."

For convenient reference, Section 28 of the Arizona Enabling Act of 1910, ch. 310, 36 Stat. 557, 574-75, is reproduced in its entirety as follows:

"SEC. 28. That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom, for any object other than for which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, shall be deemed a breach of trust.

No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves: *Provided*, That nothing herein contained shall prevent said proposed State from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

All lands, leaseholds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid.

No lands shall be sold for less than three dollars per acre, and no lands which are or shall be susceptible of irrigation under any projects now or hereafter completed or adopted by the United States under legislation for the reclamation of lands, or under any other project for the reclamation of lands, shall be sold at less than twenty-five dollars per acre: *Provided*, That said State, at the request of the Secretary of the Interior, shall from time to time relinquish such of its lands to the United States as at any time are needed for irrigation works in connection with any such government project. And other lands in lieu thereof are hereby granted to said State, to be selected from lands of the character named and in the manner prescribed in section twenty-four of this Act.

There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this Act to said proposed State all land actually or prospectively valuable for the development of water powers or power for hydro-electric use or transmission and which shall be ascertained and designated by the Secretary of the Interior within five years after the proclamation of the President declaring the admission of the State; and no lands so reserved and excepted shall be subject to any disposition whatsoever by said State, and any conveyance or transfer of such land by said State or any officer thereof shall be absolutely null and void within the period above named; and in lieu of the land so reserved to the United States and excepted from the operation of any of said grants there be, and is hereby, granted to the proposed State an equal quantity of land to be selected from land of the character named and in the manner prescribed in section twenty-four of this Act.

A separate fund shall be established for each of the several objects for which the said grants are hereby made or confirmed, and whenever any moneys shall be in any manner derived from any of said land the same shall be deposited by the state treasurer in the fund corresponding to the grant under which the particular land producing such

moneys was by this Act conveyed or confirmed. No moneys shall ever be taken from one fund for deposit in any other, or for any object other than that for which the land producing the same was granted or confirmed. The state treasurer shall keep all such moneys invested in safe, interest-bearing securities, which securities shall be approved by the governor and secretary of state of said proposed State, and shall at all times be under a good and sufficient bond or bonds conditioned for the faithful performance of his duties in regard thereto, as defined by this Act and the laws of the State not in conflict herewith.

Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this Act shall be null and void, any provision of the constitution or laws of the said State to the contrary notwithstanding.

It shall be the duty of the Attorney-General of the United States to prosecute, in the name of the United States and in its courts, such proceedings at law or in equity as may from time to time be necessary and appropriate to enforce the provisions hereof relative to the application and disposition of the said lands and the products thereof and the funds derived therefrom.

Nothing herein contained shall be taken as in limitation of the power of the State or of any citizen thereof to enforce the provisions of this Act."

Appendix 2

Note: All underlining added.

Excerpts from Act of June 26, 1915, 2d Spec. Sess.,
ch. 5, 1915 Ariz. Sess. Laws 13

***"

Sec. 38. The department is hereby authorized to execute leases and contracts for the leasing of lands containing gold, silver, copper, lead or other valuable minerals, or for any land containing shale, slate, petroleum, natural gas, or other valuable natural deposits which the state now owns or to which it may hereafter acquire title.

(a) Any citizen of the United States finding valuable minerals upon any unsold lands of the state may apply to the department for a lease of any amount of land not to exceed the amount and dimensions allowed by the mining laws of the state and the United States.

(b) The manner of locating a mineral claim upon state land shall be in accordance with the law of the state regulating the location of mineral claims on government lands; provided, that any citizen or citizens who may have found minerals on unsold state lands previous to the passage of this act and posted notices in accordance with the mining laws of the State, and the United States, shall have preference right to lease the same, and shall have ninety (90) days after the passage of this act, in which to make application to the department for such lease.

(c) For the purpose of developing such mine or mines, the applicant shall, upon the payment of five (5) dollars per claim, receive from the department a lease for two years; provided, however, that no more than fifty tons of ore shall be removed from the premises for any purposes until a contract shall have been executed, as hereinafter provided.

(d) The lessee may cut and use the timber found upon said claim for fuel, and in the construction of buildings required in the operation of any mine or mines, on the claim; also the timber necessary for drains, tramways, and supports for such mine or mines, but for no other purpose.

(e) Any time prior to the expiration of said lease, the lease-holder, or any assignee thereof, shall have the right to obtain from said department a contract, which shall bind the State of Arizona, as a party of the first part, and the person, or persons, or corporation, to whom said contract shall issue, as party of the second part, in a mutual observance of such obligations, terms, and conditions as may be agreed upon by said department and the said lessee.

(f) Whenever any lessee of mining property shall be convicted of fraud or wilful misrepresentation in connection with the procuring of any such lease, or the handling or shipping of ores or other dealing with the product or proceeds of any property leased under the provisions of this act, the penalty shall be the forfeiture of the lease to any such mine or mining claim, and all improvements placed thereon, or used in connection therewith, and all property pertaining thereto and all moneys paid thereon and all rights, title or claim to any and all of said property shall be vested in the state without further or other procedure on the part of the state."

"* * *

Appendix 3

Note: All underlining added.

Excerpts from Act of November 15, 1927, 4th Spec.
Sess., ch. 29, 1927 Ariz. Sess. Laws 207

"Be It Enacted By the Legislature of the State of Arizona:

Section 1. That Section 38 of Chapter 5 of the acts of the Second Special Session of the Second Legislature, State of Arizona, 1915, be and the same is hereby amended to read as follows:

Section 38. The department is hereby authorized to execute leases and contracts for the leasing of lands containing gold, silver, copper, lead or other valuable minerals, or for any land containing shale, slate, petroleum, natural gas, or other valuable natural deposits which the state now owns or to which it may hereafter acquire title.

(a) Any citizen of the United States finding valuable minerals upon any unsold lands of the state may apply to the department for a lease of any amount of land not to exceed the amount and dimensions allowed by the mining laws of the state and the United States.

(b) The manner of locating a mineral claim upon state land shall be in accordance with the law of the state regulating the location of mineral claims on government lands; provided, that any citizen or citizens who may have found minerals on unsold state lands previous to the passage of this act and posted notices in accordance with the mining laws of the state and the United States, shall have preference right to lease the same.

(c) For the purpose of developing such mine or mines, the applicant shall, upon the payment of five dollars per claim, receive from the department a lease for two years;

provided, however, that no more than fifty tons of ore shall be removed from the premises for any purposes until a contract shall have been executed, as hereinafter provided.

(d) The lessee may cut and use the timber found upon said claim for fuel, and in the construction of buildings required in the operation of any mine or mines, on the claim; also the timber necessary for drains, tramways, and supports for such mine or mines, but for no other purpose.

(e) Any time prior to the expiration of said lease, the lease-holder, or any assignee thereof, shall have the right to obtain from said department a contract, which shall bind the State of Arizona, as a party of the first part, and the person, or persons, or corporation, to whom said contract shall issue, as party of the second part, in a mutual observance of such obligations, terms and conditions as may be agreed upon by said department and the said lessee.

(f) Whenever any lessee of mining property shall be convicted of fraud or wilfull misrepresentation in connection with the procuring of any such lease, or the handling or shipping of ores or other dealing with the product or proceeds of any property leased under the provisions of this act, the penalty shall be the forfeiture of the lease to any such mine or mining claim, and all improvements placed thereon, or used in connection therewith, and all property pertaining thereto and all moneys paid thereon and all rights, title or claim to any and all of said property shall be vested in the state without further or other procedure on the part of the state.

(g) The department is hereby authorized to execute oil and gas prospecting leases which shall run for a term of two years and under which a rental of one hundred dollars shall be paid for each six hundred and forty acres for the two year term. The rental under a lease containing less than six hundred and forty acres shall be at the rate of twenty-five dollars for each one hundred and sixty acres or fraction thereof. Not exceeding two thousand five hundred

and sixty acres shall be included in any one such prospecting lease. A separate lease must be executed for each separate parcel or plot of land, and all lands included in any lease must be adjoining.

In the event lessee shall have started actual drilling for oil and is continuing same, prior to the expiration of the term mentioned in said lease, said lessee shall have the right of renewal, and, provided, that in the event oil or gas shall have been discovered to exist in commercial quantities on lands covered in such lease prior to the expiration of such lease, then and in that event, lessee shall have the right to, and the Department is hereby authorized and directed to issue to said lessee a development and operating lease upon said land which shall run for a period of five years and which upon expiration shall be renewable for succeeding terms of five years each provided, the lessee drill at least two wells, or that the second well is being drilled at the expiration of said lease. Said procedure to continue for each succeeding five year period until three wells have been drilled for each section of land included in the lease. Should the lease be for more than one hundred and sixty acres and less than six hundred and forty acres, the second well may be in the development state at the expiration of the original lease. Such renewals shall be subject to such terms and conditions as may be fixed by law, and the rules and regulations of the State Land Commissioner not in conflict with law. Provided, however, that the annual rental to be charged under the terms of such development and operating lease shall be ten cents per acre per year; and the royalty to be paid to the State of Arizona on the oil and/or gas commercially produced from the said premises under the prospecting and/or development and operating lease shall be twelve and one-half per centum of oil and/or gas produced from said land.

Section 2. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved November 15, 1927."

Appendix 4

**Arizona's Current
Mineral Leasing Law**
(Ariz. Rev. Stat. §§ 27-231 through 27-238)

**"§ 27-231. Location of mineral claim on state land;
definition**

A. Any natural person over eighteen years of age and any other person qualified to transact business in this state who discovers a valuable mineral deposit on any state land may enter upon and locate the deposit as a mineral claim.

B. The term "mineral" includes mineral compound and mineral aggregate.

**§ 27-232. Methods of locating claims; extent of
extralateral rights**

A. If the mineral deposit is a vein, lode or ledge, it may be located in the manner provided for the location of mineral claims upon the public domain of the United States. Upon obtaining a lease on land so located, as provided in this article, the lessee shall be entitled during the term of the lease to extralateral rights in the discovery vein only to the same extent as similar mineral locations upon the public domain of the United States under the provisions of Title 30, United States Code, section 26 (U.S. revised statutes, section 2322).

B. Any mineral claim, however, may be located in conformity with the lines of the public land survey, embracing not more than twenty acres. In such case the location shall be marked upon the ground by erecting a monument or placing a post extending at least three feet above the surface of the ground at each angle corner of the claim, as nearly as possible, and by placing in each monument, or on each post, a memorandum stating the name of the locator,

the name of the claim and designating the corner by reference to cardinal points, and within thirty days thereafter by filing for record in the office of the county recorder of the county in which the claim is located, a notice of location which shall set forth:

1. The name of the locator.
2. The name of the claim.
3. The date of location.
4. The legal description of the land claimed.

C. One copy of the location notice of any claim located pursuant to this section, together with the county recorder's certificate of recordation, shall be filed in the office of the state land commissioner within thirty days after the date of location.

**§ 27-233. Preferred right of locator to lease land;
discovery work; lease renewal**

A. The locator of a lode mining claim or claims on state lands pursuant to this article shall have a preferred right to a mineral lease of each claim within ninety days after the date of location.

B. The locator of a lode mining claim located pursuant to § 27-232 shall be required to perform the discovery work required by law for mining claims under the laws of the United States within the ninety-day period or an equivalent amount of development drilling of a reasonable value of one hundred dollars on each claim. The development drilling may be centrally located and need not be upon each individual claim, but shall be so located as to be part of a plan of development for the group, and in no event shall the minimum requirement prescribed for each individual claim be dispensed with. The locator shall not receive a lease

unless he submits to the state land commissioner satisfactory proof of the performance of such discovery work within such reasonable time as the land commissioner prescribes.

C. Upon application to the commissioner, not less than thirty nor more than sixty days prior to the expiration of the lease, the lessee of mineral lands, if he is not delinquent in the payment of rental or royalty on the date of expiration of the lease, shall have a preferred right to renew the lease bearing even date with the expiration of the old lease for a term of twenty years.

§ 27-234. Rent; royalty; termination of lease by lessee

A. The rental for a mineral lease of state lands shall be fifteen dollars per annum, payable in advance at the time of application for lease and at the beginning of each yearly period thereafter.

B. Every mineral lease of state land shall provide for payment to the state by the lessee of a royalty of five percent of the net value of the minerals produced from the claim. The net value is deemed to be the gross value after processing, where processing is necessary for commercial use, less the actual cost of transportation from the place of production to the place of processing, less costs of processing and taxes levied and paid upon the production of the minerals. In case of minerals not processed for commercial use, the net value is the gross proceeds, or gross value, at the place of sale or use, less the actual cost of transportation from the place of production to the place of sale or use, less taxes, if any, levied and paid upon the production of the minerals. The lease shall not require the payment of any royalty in advance of actual production of minerals from the claim.

C. The lessee of any mineral lease may, if not delinquent in the payment of rent or royalty to the date of termination, terminate the lease at any time during its term by giving the commissioner thirty days' notice of termination in writing.

§ 27-235. Terms of lease

A. Every mineral lease of state lands shall be for a term of twenty years.

B. The lease shall confer the right:

1. To extract and ship minerals, mineral compounds and mineral aggregates from the claim located within planes drawn vertically downward through the exterior boundary lines thereof. In case of leases made pursuant to locations under subsection A of § 27-232, the lease shall confer extralateral rights in the discovery vein similar to those given locators upon the public domain of the United States under the provision of Title 30, United States Code, § 26 (U.S. revised statutes, section 2322).

2. To use as much of the surface as required for purposes incident to mining.

3. Of ingress to and egress from other state lands, whether or not leased for purposes other than mining.

C. Every mineral lease of state lands shall provide for:

1. The performance of annual labor, as required by the laws of the United States, upon each claim or group of claims in common ownership, commencing at the expiration of one year from the date of location, and for furnishing proof thereof to the commissioner.

2. The fencing of all shafts, prospect holes, adits, tunnels and other dangerous mine workings for the protection of live stock.

3. The construction of necessary improvements and installation of necessary machinery and equipment with the right to remove it upon expiration, termination or abandonment of the lease, if all monies owing to the state under the terms of the lease have been paid.

4. The cutting and use of timber and stone upon the claim, not otherwise appropriated, for fuel, construction of necessary improvements, or for drains, roadways, tramways, supports, or other necessary purposes.

5. The right of the lessee and his assigns to transfer the lease.

6. Termination of the lease by the commissioner upon written notice specifically setting forth the default for which forfeiture is declared, and preserving the right to cure the default within a stated period of not less than thirty days.

§ 27-236. Suspension of royalty rights

The commissioner may, if he deems it in the interest of the state, subordinate the royalty rights of the state under this article, or suspend the operation thereof or of any lease executed under the provisions of this article, in favor of the United States or any agency thereof, for the purpose of facilitating extension of financial aid under the laws of the United States in the development or operation of any mine located upon state lands.

§ 27-237. Review by commissioner

All questions arising between a locator or lessee and the commissioner under this article shall be subject to review as in other cases involving state lands, and the locator's or lessee's right to possess and operate his claim shall continue until the question is finally determined.

§ 27-238. Existing leases

Every mineral lease in effect on June 16, 1941 under the provisions of § 2973, Revised Code of 1928, shall remain in effect for the unexpired term for which it was granted, without right of renewal, or, at the option of the lessee, may be superseded by a lease as provided by this article."

Appendix 5

Note: All underlining added.

**A JOINT RESOLUTION PROPOSING AN
AMENDMENT TO THE CONSTITUTION
OF THE STATE OF NEW MEXICO**

H.J.R. No. 8; Approved March 11, 1927.

"Be it Resolved by the Legislature of the State of New Mexico:

That the following Amendment to the Constitution of the State of New Mexico is hereby proposed to be added thereto as a new Article to be known as ARTICLE XXIV and entitled: CONTRACTS FOR DEVELOPMENT AND PRODUCTION OF MINERALS ON STATE LANDS, to be submitted to the electors of the State at the next general election, when and after the Congress of the United States shall consent thereto.

ARTICLE XXIV

**CONTRACTS FOR THE DEVELOPMENT AND
PRODUCTION OF MINERALS ON STATE LANDS.**

Leases and other contracts, reserving a royalty to the state, for the development and production of any and all minerals on lands granted or confirmed to the State of New Mexico by the Act of Congress of June 20, 1910, entitled "An Act to enable the people of New Mexico to form a constitution and state government and be admitted into the Union on an equal footing with the original states," may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement and competitive bidding, and containing such terms and provisions as may be provided by act of the Legislature; the rentals, royalties and other proceeds therefrom to be applied and conserved in accordance with the

provisions of said Act of Congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made."

Appendix 6

Note: All underlining added.

**Pub. Res. No. 7, ch. 28
45 Stat. 58 (1928)**

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That consent is hereby given and granted to the State of New Mexico and the qualified electors thereof to vote upon the question of amending the constitution of said State and to amend the same by the adoption of the following amendment proposed by the legislature of said State at its eighth regular session by H. J. Res. 8, approved March 11, 1927, to be designated as Article XXIV, said amendment being as follows, to wit:

"Article XXIV**"CONTRACTS FOR THE DEVELOPMENT AND
PROTECTION OF
MINERALS ON STATE LANDS**

"Leases and other contracts, reserving a royalty to the State for the development and production of any and all minerals on lands granted or confirmed to the State of New Mexico by the Act of Congress of June 20, 1910, entitled 'An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States,' may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement, and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature; the rentals, royalties, and other proceeds therefrom to be applied and conserved in accordance with the provisions of said Act of Congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made."

"Consent also is given and granted to said State to enact such laws and establish such rules and regulations as it may deem necessary to carry such constitutional provision into full force and effect should the same be duly and legally adopted."

Approved, February 6, 1928.

Appendix 7

Note: All underlining added.

CONSTITUTION OF NEW MEXICO**ARTICLE XXIV****"Leases on State Land**

Section 1. Contracts for the development and pro-
duction of minerals [or development and operation of
geothermal steam and waters] on state lands.

Leases and other contracts, reserving a royalty to the state, for the development and production of any and all minerals [or for the development and operation of geothermal steam and waters] on lands granted or confirmed to the state of New Mexico by the act of congress of June 20, 1910, entitled "An act to enable the people of New Mexico to form a constitution and state government and be admitted into the union on an equal footing with the original states," may be made under such provisions relating to the necessity or requirement for or the mode and manner of appraisement, advertisement and competitive bidding, and containing such terms and provisions, as may be provided by act of the legislature; the rentals, royalties and other proceeds therefrom to be applied and conserved in accordance with the provisions of said act of congress for the support or in aid of the common schools, or for the attainment of the respective purposes for which the several grants were made." (As added November 6, 1928; as amended November 7, 1967.)

NOTES:

The 1928 amendment proposed by H.J.R. No. 8 (Laws 1927) and adopted by the people on November 6, 1928, added this section as Article XXIV.

The 1967 amendment proposed by H.J.R. No. 17 (Laws 1967) and adopted by the people on November 7, 1967, inserted the words that are bracketed.

Appendix 8

Note: All underlining added.

**Act of March 14, 1950, 1st Spec. Sess.,
1951 Ariz. Sess. Laws 483**

HOUSE CONCURRENT RESOLUTION NO. 5**NINETEENTH LEGISLATURE, FIRST SPECIAL
SESSION****"A CONCURRENT RESOLUTION****PROPOSING AN AMENDMENT OF THE
CONSTITUTION OF ARIZONA
RELATING TO STATE AND SCHOOL LANDS.****BE IT RESOLVED BY THE HOUSE OF
REPRESENTATIVES OF THE STATE OF
ARIZONA, THE SENATE CONCURRING:**

1. The following amendment of section 3, Article X, constitution of Arizona, is proposed, to become valid as a part of the constitution when approved by a majority of the qualified electors voting thereon and upon proclamation of the governor; and if and when section 28 of the Enabling Act of the State of Arizona is amended in such manner as to make this amendment valid:

Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full

description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in Article X contained, shall prevent: 1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;

2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement, or, 3. the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as long thereafter as oil, gas or other hydrocarbon substances may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions, as the Legislature may prescribe, the terms and provisions to include a reservation of a royalty to the state of not less than twelve and one-half per cent of production.

2. The proposed amendment (approved by a majority of members elected to each house of the Legislature, and entered upon the respective journals thereof, together with the ayes and nays thereon) shall by [sic] by the secretary

of state submitted to the qualified electors at the next regular general election (or at a special election called for that purpose), as provided by Article XXI, constitution of Arizona."

Passed the House March 14, 1950 by the following vote: 42 Ayes, 4 Nays, 12 Absent, 0 Excused.

Passed the Senate March 14, 1950 by the following vote: 17 Ayes, 1 Nay, 1 Not voting.

Filed in the Office of the Secretary of State – March 14, 1950.

Appendix 9

Note: All underlining added.

CONSTITUTION OF ARIZONA Article 10

"§ 3. Mortgage or other encumbrance; sale or lease at public auction

Section 3. No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein, or elsewhere in article X contained, shall prevent:

1. The leasing of any of the lands referred to in this article in such manner as the Legislature may prescribe, for grazing, agricultural, commercial and homesite purposes, for a term of ten years or less, without advertisement;

2. The leasing of any of said lands, in such manner as the Legislature may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes,

other than for the exploration, development, and production of oil, gas and other hydrocarbon substances, for a term of twenty years or less, without advertisement, or,

3. The leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas and other hydrocarbon substances on, in or under said lands for an initial term of twenty (20) years or less and as long thereafter as oil, gas or other hydrocarbon substances may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions, as the Legislature may prescribe, the terms and provisions to include a reservation of a royalty to the State of not less than twelve and one-half per cent of production."

Amendment approved election Nov. 5, 1940, eff. Nov. 27, 1940; election Sept. 12, 1950, eff. Oct. 2, 1950.

NOTES:

The governor, on November 27, 1940, proclaimed that the amendment of this section, as proposed by Laws 1939, H.C.R. No. 3, § 1, filed March 13, 1939, had been approved by a majority of the electors in the November 5, 1940 general election and had become law.

Prior to the 1940 amendment, this section had read:

"No mortgage or other incumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of

the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State Capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the lands themselves; Provided, that nothing herein contained shall prevent the leasing of said lands referred to in this Article, for a term of five years or less, without said advertisement herein required.

The 1940 amendment, in the first sentence, substituted "of the said lands, or any part thereof" for "of the said lands, or any thereof." The proviso at the end of the second sentence of the original section was rewritten by the 1940 amendment and made into a new third sentence which read: "Nothing herein contained, however, shall prevent the leasing of any of the lands referred to in this article in such manner as the legislature may prescribe, for grazing and agricultural purposes, for a term of ten years or less, nor the leasing of any of said lands, whether also leased for grazing and agricultural purposes or not, for mineral purposes (including exploration for oil and gas and the extraction thereof) for a term of twenty years or less, without advertisement."

The governor, on October 2, 1950, proclaimed the amendment of this section, as proposed by Laws 1950, 1st S.S., H.C.R. No. 5, filed March 14, 1950 (see Laws 1951, pp. 483 and 690), had been approved by a majority of the electors in the September 12, 1950 special election and had become law. The effectiveness of the amendment was conditioned on a congressional amendment of the Enabling Act, § 28 "in such manner as to make this amendment valid." The required amendment to the Enabling Act was enacted by Congress in Act of June 2, 1951, c. 120, 65 Stat. 51.

In 1950, the third sentence was again rewritten to read as set out in the present text beginning "Nothing herein, or elsewhere in Article X contained, shall prevent:" and including pars. 1 to 3.

"§ 4. Sale or other disposal; appraisal; minimum price; credit; passing of title

Section 4. All lands, lease-holds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid."

Appendix 10

Note: All underlining added.

Excerpt from Laws of Arizona, 1951

CHAPTER 124

(House Bill No. 9)

"AN ACT

RELATING TO STATE LANDS; PROVIDING FOR THE ISSUANCE OF LEASES OF STATE LANDS FOR THE EXPLORATION FOR AND DEVELOPMENT OF OIL, GAS AND OTHER HYDROCARBON SUBSTANCES WHICH MAY BE PROCURED AND PRODUCED THEREFROM;...

Be it Enacted by the Legislature of the State of Arizona:

Section 1. SHORT TITLE. This Act may be cited as the Arizona oil and gas leasing Act of 1951.

Sec. 2. DEFINITIONS. In this Act unless the context otherwise requires:

(a) "department" means the state land department;

(b) "lease" as used herein shall mean an oil and gas lease issued pursuant to the provisions of this Act;

* * *

(h) "state lands" means any land or any interest therein owned or held in trust, or otherwise, by the state, including but not limited to leased school or university lands.

* * *

Sec. 3. LEASING OF STATE LANDS FOR OIL AND GAS. The department, subject to the provisions of this Act, is hereby authorized and empowered to lease state lands for oil and gas and to issue oil and gas leases thereon as follows:

(a) When the state lands are not located within any known geological structure of a producing oil and gas field, as determined pursuant to subsection (c) hereof, the person making the first application for the lease shall be issued a lease covering such lands without competitive bidding:

(1) Such noncompetitive leases shall provide for the payment by the lessee of a royalty of twelve and one-half percent of all oil, gas and other hydrocarbons produced, saved, sold and removed from the lands of the market value thereof at the well as of the time of sale or removal from the lands, as the department may elect.

(2) Such leases shall provide for an annual rental of one dollar and twenty-five cents per acre per year, until oil or gas in paying quantities is discovered on the lands covered by the lease. Such rental shall be payable as follows: . . . The subsequent rental payments from date of such discovery of oil or gas in paying quantities upon the land covered by the lease shall be at the rate of one dollar per acre per year and shall be credited on the royalty payments for that year. All leases shall provide for a minimum rental of eighteen dollars per year.

(3) Such leases shall be for term of five years and as long thereafter as oil, gas or other hydrocarbon substances are procured and produced therefrom in paying quantities. . . .

* * *

(10) Application for noncompetitive leases shall be in writing addressed to the department and shall contain

a description of the lands sufficient to identify same, the name and address of the applicant, and shall be accompanied by a filing fee of ten dollars and the rental payment for the first year. . . .

* * *

(b) When state lands are located within a known geological structure of a producing oil or gas field, as determined pursuant to subsection (c) hereof, such lands shall be leased only by sealed bids, as follows:

(1) Upon receipt of an application to lease any of such lands or whenever, in the opinion of the department, there shall be a demand for the purchase of leases of any such lands, the department shall offer such tract or tracts for lease to the highest qualified bidder submitting a sealed bid therefor, on the basis of a cash bonus.

(2) The department shall publish a call for sealed bids twice in a newspaper of general circulation in the state, the last publication to be not less than fifteen days prior to the date fixed for the opening of the bids. . . .

(3) The publication shall contain a description of the land proposed to be leased, the time when the bids will be received and opened, the royalty to be demanded which the department shall fix prior to call for bids at not less than twelve and one-half percent, and an annual rental to be demanded in the amount of one dollar per acre per year, and which said rental for each year shall be credited on the royalty payments for that year.

* * *

(5) Each such lease shall be for a term of five years and as long thereafter as oil, gas or other hydrocarbon substances are procured and produced in paying quantities from the lands covered by the lease.

* * *

(c) The department shall from time to time determine and designate the known geological structures of producing oil and gas fields. Such determinations and designations shall be published twice in a newspaper of general circulation in the state, the last publication to be not less than five days from the first date of publication....

Sec. 4. WATER. A lessee shall have the right to develop water for use in its operations subject to the applicable laws of this state pertaining to the drilling of water wells and the use of water produced therefrom....

Sec. 5. ASSIGNMENT OF LEASE....

* * *

Sec. 14. EFFECTIVE DATE. This Act shall become effective when the Congress of the United States amends section 28 of the Enabling Act of the state of Arizona, in such manner as to make valid the amendment of section 3, article X, of the Constitution of Arizona, approved by a majority of the qualified electors voting thereon at the special election held on September 12, 1950, and proclaimed by the governor on October 2, 1950.

Sec. 15. EMERGENCY. To preserve the public peace, health, and safety it is necessary that this Act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law."

Approved by the Governor - March 28, 1951.

Filed in the Office of the Secretary of State - March 28, 1951.

Appendix 11

Note: All underlining added.

**1951 Amendment to Section 28
of Arizona's Enabling Act
Act of June 2, 1951, ch. 120,
65 Stat. 51 (1951)**

Public Law 44

Chapter 120

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the third paragraph of section 28 of the Act entitled "An Act to enable the people of New Mexico to form a constitution and State government and be admitted into the Union on an equal footing with the original States; and to enable the people of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States," approved June 20, 1910, as amended, is amended to read as follows:

"No mortgage or other encumbrance of the said lands, or any part thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of the county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the State capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of the lands so offered; nor shall any sale or contract for the sale of any timber or other natural product of such lands be made, save

at the place, in the manner, and after the notice by publication provided for sales and leases of the lands themselves. Nothing herein contained shall prevent: (1) the leasing of any of the lands referred to in this section, in such manner as the Legislature of the State of Arizona may prescribe, for grazing, agricultural, commercial, and homesite purposes, for a term of ten years or less; (2) the leasing of any of said lands, in such manner as the Legislature of the State of Arizona may prescribe, whether or not also leased for grazing and agricultural purposes, for mineral purposes, other than for the exploration, development, and production of oil, gas, and other hydrocarbon substances, for a term of twenty years or less; (3) the leasing of any of said lands, whether or not also leased for other purposes, for the exploration, development, and production of oil, gas, and other hydrocarbon substances on, in, or under said lands for an initial term of twenty years or less and as long thereafter as oil, gas, or other hydrocarbon substance may be procured therefrom in paying quantities, the leases to be made in any manner, with or without advertisement, bidding, or appraisement, and under such terms and provisions as the Legislature of the State of Arizona may prescribe, the terms and provisions to include a reservation of a royalty to said State of not less than 12½ per centum of production; or (4) the Legislature of the State of Arizona from providing by proper laws for the protection of lessees of said lands, whereby such lessees shall be protected in their rights to their improvements (including water rights) in such manner that in case of lease or sale of said lands to other parties the former lessee shall be paid by the succeeding lessee or purchaser the value of such improvements and rights placed thereon by such lessee."

Approved June 2, 1951.

No. 87-1661

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In The

Supreme Court of the United States

October Term, 1988

ASARCO INCORPORATED, ET AL.,

Petitioners,

v.

FRANK AND LORAIN KADISH, ET AL.,

Respondents.

**On Writ Of Certiorari To The Arizona
Supreme Court**

**BRIEF OF THE STATES OF CALIFORNIA, IDAHO,
MONTANA, MINNESOTA, NEW MEXICO, NORTH
DAKOTA, OKLAHOMA, SOUTH DAKOTA, UTAH,
WASHINGTON AND WYOMING AS AMICI CURIAE
IN SUPPORT OF RESPONDENTS**

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QUESTION PRESENTED

Did Congress, in extending the school lands grant to mineral-bearing lands, intend to give state legislatures unlimited authority to abrogate the trust in which such lands are held?

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INTEREST OF AMICI STATES

The amici states represented in this brief have a vital common interest in the assertion and protection of their school lands trust responsibilities and in preventing extraneous pressures from interfering with the prudent management of school lands trust assets. School land revenues represent an important asset for the public schools of the states with school lands. A recent study shows that 10 western school land states received a total of \$357 million in trust revenues from those lands in fiscal year 1987. S. Fairfax and J. Souder, *Western States' Trust and Sovereign Land Resource & Management Survey Questionnaire 43* (Inst. of Govt'l. Studies Univ. of Calif., Berkeley July, 1988).

Petitioners assert that the trust responsibilities placed upon the several western states through their enabling acts were repealed by the Jones Act grant of mineral lands to the states. Pet. Br. at 32-34. Not only does the legislative history of the Jones Act belie this claim, but the states' interpretation of the trust responsibilities imposed upon them by their enabling acts and extended to mineral lands by the Jones Act confirms the essential inaccuracy of ASARCO's assertions. No state other than Arizona treats its mineral-bearing trust lands as if trust responsibilities did not attach and as if the fair market value of the assets were irrelevant. At a minimum, all other states receiving school trust lands of mineral character under the Jones Act require negotiation of royalty amounts or set *minimum* royalty values. No state legislature other than Arizona's has interpreted its trust responsibility to allow trust assets to be leased or sold at a *maximum* royalty value or even given away at no receipt of value by the state at all.

The amici states herein respectfully request this Court to uphold the decision of the Arizona Supreme Court enforcing Arizona's obligation to manage its school lands trust assets for the maximum benefit of the public schools.

STATEMENT OF THE CASE

Amici adopt respondents' statement of the case.

SUMMARY OF ARGUMENT

The school lands grant to newly admitted states represents a solemn agreement between the federal government and the states under which, in exchange for a representative portion of the public lands, the states would forbear attempting to tax or gain possession of the large federal holdings within their borders, and would commit their revenues for the support of the public schools. This statutory grant has its roots in the earliest years of the New World. As it developed in the public land states, it represented a painfully wrought compromise designed to avoid serious constitutional questions of equal footing raised by the discrepancy of federal landholding between the original 13 states and those that later joined the Union.

When Congress extended this grant to mineral lands in 1927 it did not intend that these more valuable trust assets should enjoy lesser protection than those already granted to states since 1802. In authorizing their lease in

such manner as the state legislatures may prescribe, Congress intended that states should have flexibility in their administration; not the power to give them away at fire sale prices.

ARGUMENT

I.

INTRODUCTION

The concept of granting lands for the support of schools pervades American history. As early as 1635 the Massachusetts General Court made an island in Boston Harbor available to the town of Dorchester for its public schools, and 1,000 acre tracts were set aside by Boston and other towns for support of the public schools throughout the 17th century. B. Hibbard, *A History of the Public Land Policies* 306 (Macmillan 1924). Similar grants were recorded in Maryland, Virginia and New Netherlands. *Id.* 307-308. The policy of setting aside lands for education was embraced by the Continental Congress in the Ordinance of May 20, 1785, which reserved the 16th section of every township of the Western Territory for the maintenance of public schools. The Northwest Ordinance set forth its policy succinctly: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Ordinance of July 13, 1787, set forth in Donaldson, *The Public Domain* 224 (GPO 1884); see *United States v. Wyoming*, 331 U.S. 440, 443 (1947).

Its roots are deep in federalism. Although later expressions have described the grant as a simple bargain in which the federal government agreed to give lands in exchange for the states' commitment to support their public schools with the revenues, it appears to have a basis as well in the historic tug of war over federal landholding. Several commentators have characterized it as part of the compromise under which the public land states agreed not to contest or tax the federal landholdings within their borders in exchange for the school land and other grants. Gates, History of Public Land Law Development 317 (Zenger Ed. 1968); S. Fairfax and C. Yale, Federal Lands 16 (Island Press 1987). The grant of numbered sections within each township was designed to provide the states with "a proportionate part and fair cross section of all classes of land within its boundaries." Remarks of Senator Watkins, 104 Cong. Rec. 11919-11922 (1958). See *Andrus v. Utah*, 446 U.S. 500, 508 (1980). In the history of the program, over 77 million acres were given for the common schools. As one commentator said, "The galvanizing effect of the grants in stimulating education can hardly be exaggerated." Gates, *supra*, 319-339. In "The Winning of the West," Theodore Roosevelt said the school grants laid "the basis for the whole system of public education" in the western states.

Revenues from the school lands provided the principal base for public education throughout the west. They were valuable because full value was derived from them. It is questionable whether, in the "gilded age" of the

nineteenth century, this would have occurred in the absence of trust obligations.¹

The contribution of the school grants to the developing states is all the more astonishing in light of the general state of public land administration in the nineteenth century. Fraud, incompetence and inefficiency were rampant in the disposition of the public lands. A contemporary description of the state of affairs indicated "The great corporations and other monopolies have for many years been stretching out their strong and unscrupulous arms over the public lands . . . Millions of acres of this domain have been seized and stolen, and I have to say this robbery could not have succeeded without the collusion and cooperation of agents employed to protect the interests of the people." Comments of Judge David Davis, quoted in H. Dunham, Some Crucial Years of the General Land Office, 1875-1890, reprinted in The Public Lands, Carstensen ed. (U. of Wis. Press 1968). See also Nash, The California State Land Office, 1858-1898, 27 Huntington Lib. Q. 347 (1963-64).

Adherence to strict trust principles remains essential to carrying out the high purposes of the grant. For that reason statutes that violate the states' trust responsibilities by setting arbitrary values on school lands or their products are invalid.

¹ Indeed the progressively more specific restrictions on the states' administration of school lands indicates increasing realization of the value of the trust obligation. See *Murphy v. State*, 181 P.2d 336, 344 (Ariz. 1947).

Petitioners have properly noted that the question before this Court is one of substantial importance to other western states as well as to Arizona. However, the states represented herein differ with petitioners as to the reason for its importance. We suggest that the Arizona Supreme Court's decision below does not affect the states' "sovereign choice of how to manage their resources and support its schools." Petn. for Certiorari p. 8. Rather, the opinion supports the time-honored proposition that the school land grant imposes a trust obligation upon states to administer trust assets in a prudent and proper manner.

II.

THE SCHOOL LAND GRANTS CONFER DISCRETION ON STATE LEGISLATURES TO ADMINISTER THE TRUST. THIS DISCRETION DOES NOT EXTEND, HOWEVER, TO GIVING ITS ASSETS AWAY AT FIRE SALE PRICES

The school land grant has often been characterized as a contract; a "solemn agreement," under which the Congress agreed to cede lands to the States in exchange for their commitment to use the revenues for public education. *Andrus v. Utah*, *supra*, 446 U.S. at 507; *Oklahoma Education Assn. Inc. v. Nigh*, 642 P.2d 230, 235 (Okla. 1982); *State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist.*, 8 N.W.2d 841, 847 (Neb. 1943).

The school land grants have varied in their provisions. Some are general, merely granting the lands "for school purposes." Other grants make specific provision for their use and disposal and contain provisions for enforcement of their terms. Generally the grant is made in the enabling act under which the state enters the

union, and the state constitution subsequently adopted accepts the grant with accompanying restrictions on the use of the lands, their proceeds or both. See *Hibbard, supra*, 314-318. Even in the case of the most general statutes, however, the grant has been construed as imposing an honorary trust obligation to obtain value for school lands leased or sold. Cf. *Alabama v. Schmidt*, 232 U.S. 168 (1914); *United States v. 111.2 Acres of Land*, 293 F. Supp. 1042 (E.D.Wn. 1968), affd. 435 F.2d 561 (9th Cir. 1970). As this Court observed in considering the school grant to the State of Michigan:

"In the present instance, the grant is to the State directly, without limitation of its power, although there is a sacred obligation imposed on its public faith." *Cooper v. Roberts*, 18 How. (59 U.S.) 173, 181-182 (1855). See also *Alabama v. Schmidt*, 232 U.S. 168 (1914).

The trust in which these lands are held subjects the states to the same fiduciary obligations as apply to a private trustee. *County of Skamania v. State*, 685 P.2d 576 (Wash. 1984). The grant is intended to curb the power of the state to deal with the trust lands in the "prophetic realization . . . that the state might [otherwise be] lured from patient methods to speculative advertising . . . in the hope of a speedy prosperity." *Ervien v. United States*, 251 U.S. 41, 47-48 (1919).

While considerable latitude is given with respect to the manner in which the legislature may carry out its duty to administer school lands for the benefit of the public schools, *Ashburner v. California*, 103 U.S. 575 (1880); *Pike v. State Board of Land Commissioners*, 113 P. 447 (Idaho 1911), the states nevertheless must obtain current fair

market rental value for these lands. *State ex rel. Ebke v. Board of Educational Lands and Funds*, 47 N.W.2d 520 (Neb. 1951). See 73 Corpus Juris Secundum, Public Lands, sec. 97, p. 735: "The state holds title to school lands in trust . . . So, it is without power, as trustee, through legislative means or otherwise, to bestow a special benefit on any person or corporation, public or private, at the expense of the cestui que trust, the public school system of the state, or to alienate the school lands without receiving their full value." Thus even under a grant which appears to be absolute in its terms, the state has been held to have a trust obligation to receive fair value. E.g., 41 Ops.Cal.Atty.Gen. 202 (1963), construing Act of March 3, 1853, 10 Stat. 244.

In case after case, courts have held that the power of legislatures to provide for the manner in which the trust is administered does not carry with it the authority to subvert it for the benefit of other otherwise worthwhile purposes. *Oklahoma Education Assn., Inc. v. Nigh, supra*, 642 P.2d at 236 (authority to set rules and regulations limited to those achieving protection of assets coupled with maximum return); *State ex rel. Ebke v. Bd. of Ed. Lands & Funds*, 47 N.W.2d 520, 525 (Neb. 1951): "That the Legislature has the power to provide the method of administering the public school lands of the states as a trust is not subject to question. But the method provided must be one which is within the law governing administration of trust estates."

III.

HOLDINGS ARE UNIFORM TO THE EFFECT THAT THE UNDIVIDED DUTY OF LOYALTY TO THE TRUST PRECLUDES ITS ADMINISTRATION FOR OTHERS THAN ITS BENEFICIARIES

The temptation to use trust assets to benefit other worthy purposes has given rise to substantial litigation in this field. But uniformly, courts have held that the undivided duty states have to administer this trust for the schools precludes them from diverting its assets. Thus the states may not use their school trust assets to subsidize their highway programs, *Lassen v. Arizona*, 385 U.S. 458 (1967). They may not use them to benefit farming and ranching, *Oklahoma Ed. Assn Inc. v. Nigh, supra*, 642 P.2d 230. They may not modify contracts made for its benefit even to protect an endangered logging industry. *County of Skamania v. State, supra*, 685 P.2d 576.

Previous state court decisions have dealt with the language which petitioners contend absolves legislatures of their trust responsibilities. In every case, the courts reached the opposite conclusion. And properly so, for, as the Solicitor General has observed in this case, "(I)t would be inappropriate to limit the reach of that (appraisal) requirement, which was at the heart of the Enabling Act, without a clear indication that congress so intended." Brief for the United States as Amicus Curiae 13.

In *Oklahoma Education Association v. Nigh, supra*, 642 P.2d 230, the court considered Oklahoma's enabling act provision permitting leasing of trust lands "under such rules and regulations as the Legislature . . . may prescribe." It held that the legislature nonetheless was

bound by trust responsibilities to achieve maximum return of assets. Much the same construction was given this language by the Arizona court in 1970. In *State Land Department v. Tucson Rock & Sand Co.*, 469 P.2d 85 (Ariz. 1970), reviewed on other grounds, 481 P.2d 867 (1971), the court held that the phrase "such manner as the legislature may direct" merely authorizes the legislature to regulate the manner in which a lease is made and to set terms not in conflict with the enabling act.

It is noteworthy that the Land Commissioner of New Mexico, which was admitted under the same enabling Act (New Mexico-Arizona Enabling Act, ch. 310, 36 Stat. 557 (1910)), filed an amicus brief before the Arizona Supreme Court showing that New Mexico remains subject to the same fiduciary duty to maximize revenues as that set forth in the Arizona Court's opinion. In it he states: "The sale and leasing procedures specified by the New Mexico-Arizona Enabling Act evince the intent of Congress that neither the federally granted lands nor their products should be sold or leased by the states for less than the best possible price." Amicus Curiae Brief Of the New Mexico Commissioner of Public Lands at 13.

IV.

ESTABLISHED TRUST PRINCIPLES PRECLUDE LEGISLATURES FROM SETTING ARBITRARILY LOW LEASE VALUES FOR SCHOOL LAND LEASES

The principles of trust apply to the school land grants. *County of Skamania v. State, supra*, 685 P.2d 576; *Oklahoma Ed. Assn. v. Nigh, supra*, 642 P.2d 230; *State ex rel. Ebke v. Bd. of Educ. Lands & Funds*, 47 N.W.2d 520 (Neb.

1951); *State v. University of Alaska*, 624 P.2d 807 (Ak. 1951). A review of appropriate trust principles highlights the duties of legislatures in this respect.

In any sale of trust assets, the principal objective is to obtain the maximum price. Bogart, *The Law of Trusts and Trustees*, sec. 745, p. 6 (2d rev. ed. 1980). The trustee must determine the fair value of trust property before selling it. *Whatley v. Wood*, 404 P.2d 537 (Colo. 1965). He must secure the highest possible prices and the best possible terms. *Allard v. Pacific National Bank*, 663 P.2d 104 (Wash. 1983). And he has, in the field of school lands, a duty of undivided loyalty (subject, of course, to environmental and other statutes of general applicability) that prevents even injection of the interests of third parties such as the general public in the management of the school land res. *Ervien v. United States, supra*, 251 U.S. 41; *County of Skamania v. States, supra*, 685 P.2d 576; *State ex rel. Shepard v. Mechem*, 250 P.2d 897 (N.M. 1952); *Lake Arthur Drainage Dist. v. Field*, 199 P. 112 (N.M. 1921). A statutorily mandated maximum price for leases inevitably inhibits obtaining maximum revenues. Just as the Washington legislature was precluded from modifying timber sales contracts in an effort to protect a threatened industry, the legislature here was precluded from setting maximum royalty rates that might encourage industry development at the expense of school revenues.

V.

CONSTRUCTION OF THE SCHOOL LAND GRANT URGED BY PETITIONERS IS ABERRANT TO THE DOCTRINE AS IT HAS EVOLVED IN THE WESTERN STATES

Of the thirteen states affected by the Jones Act, seven had enabling acts requiring the disposition of school

lands at public sale.² Each of these states has interpreted their enabling acts and the Jones Act to extend the state's trust responsibilities to the disposition of school trust-lands of mineral character.³

For instance, the Colorado Act merely grants sections 16 and 36 of every township to the State "for the support of the common schools," 13 Stat. 32, ch. 37, sec. 7 (1864). Yet, the State of Colorado has applied its trust responsibilities to protect the disposition of the mineral assets granted it by the Jones Act. The Board of Land Commissioners of the State of Colorado is charged with the duty to secure "the maximum possible amount therefor . . . under such regulations as may be prescribed by law" for its school trust lands of mineral character, and it does so by calculating royalties as a percentage of gross mineral value and negotiating such royalties on a case-by-case basis within a range of 4 to 7 percent. Colo. Const. Art. IX sec. 10; C.R.S. sec. 36-1-113.

² The states principally affected by the Jones Act are Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington and Wyoming. See S. Rep. No. 603, 69th Cong., 1st Sess. 5 (1926).

³ The constitutions of a number of states also require the prior appraisal of trust assets generally, with no exemption for minerals. The Idaho Constitution, for example, prohibits the sale of trust lands at less than the "appraised price". Idaho Const. Art. IX, sec. 8. The Montana and Washington Constitutions prohibit the disposal of school trust assets for less than "full market value". Mont. Const. Art. X, sec. 11; Wash. Const. Art. XVI, sec. 1. In Wyoming, school lands can be disposed of only at public auction after appraisal, with the Board of Land commissioners directed "to realize the largest possible proceeds." Wyo. Const. Art. XVIII, secs. 1 & 3.

Colorado's application of its trust responsibilities for school lands of mineral character should be applauded and upheld as the proper interpretation of Congress' intent in extending the school land trust to mineral assets through the Jones Act.

Similarly, the enabling act admitting the states of Montana, South Dakota, North Dakota and Washington to the Union provided that school lands be disposed of only at public sale and that leasing of school lands be conducted "under regulations the legislature shall prescribe." 25 Stat. 679, ch. 180, sec. 11 (1889). Each state has interpreted this provision as subjecting the disposition of mineral lands to the state's trust responsibilities to manage assets for the benefit of the public schools. The Montana Constitution prohibits the disposition of school trust lands without payment of full market value. Mont. Const. Art. X sec. 11. Montana's legislature has delegated discretion to set royalties for leases on Montana's mineral lands on a case-by-case basis but at a *minimum* of 5 percent of smelter returns for metals or of the full market value of the minerals recovered. M.C.A. sec. 77-3-116. See *Dept. of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985).

The State of Washington has taken the same position based on the same language that act. 25 Stat. 676, ch. 180 sec. 11 (1889). The Washington Constitution allows disposal of trust assets only for "full market value . . . to be ascertained in the manner as may be provided by law." Wash. Const. Art. XVI, sec. 1. The state legislature has delegated responsibility of setting royalty rates to the Washington Board of Natural Resources. R.C.W. sec. 79.01.644.

Both the North and South Dakota constitutions direct that mineral leasing of school trust lands be carried out in the manner determined by the respective state legislatures. N.D. Const. Art. IX sec. 5; S.D. Const. Art. VIII sec. 19. Both states interpret the fulfillment of their trust responsibilities to require the setting of *minimum* royalty rates for mineral leasing. In North Dakota all mineral leases must be competitively bid and minimum royalty rates and terms are set by the Board of University and School Lands. N.D.C.C. secs. 38-11-04; 38-11-02.1, .2. The South Dakota legislature has set minimum royalties at \$25 per year plus 5 percent of the fair market value of the minerals extracted with a delegation of responsibility to set additional royalties to the Commissioner of School and Public Lands. S.D.C.L. sec. 5-7-11.1. The South Dakota Commissioner for School and Public Lands has increased the royalty from the statutory minimum of 5 to 10 percent of fair market value of minerals extracted and may require competitive bidding for such mineral leases. S.D.C.L. secs. 5-7-2, 5-7-11.1; S.D.Admin.R. 4:01:03:04.

All four of these states have interpreted their trust responsibilities to apply to the leasing of mineral interests on lands granted to them by the United States for the support of the public schools. Each of these states has interpreted its trust duties to include setting at least a *minimum* royalty and Montana and Washington explicitly require the maximization of revenues for the support of the public schools.⁴

⁴ It is interesting to note that Minnesota, the nation's leading producer of iron ore, discharges its obligations under

(Continued on following page)

The states of Idaho and Wyoming were also admitted to the Union by enabling acts permitting the disposal of school trust lands only at public sale pursuant to such laws as their respective legislatures shall prescribe. 26 Stat. 215, 216, ch. 656, sec. 5 (1890); 26 Stat. 222, 223, ch. 664, sec. 5 (1890). The Idaho Constitution applies the state's trust responsibilities to school trust lands by requiring the Idaho Board of Land Commissioners to lease trust lands in a manner that will secure maximum long-term financial return and not be sold for less than the appraised price. Id. Const. Art. IX, sec. 8. Current Idaho statutes allow the Board to set royalties on a case-by-case basis with a *minimum* royalty of two and a half per cent. Id. Code sec. 47-704.

(Continued from previous page)

applicable federal-state law relating to school grant land by marketing its school, swamp, and other federal grant land minerals under a public auction leasing system that requires bidders to meet or exceed minimum base royalty rates established by statute or administrative sale (see Minn. Stat. secs. 93.08-93.12 and 93.14-93.25, for example). Minnesota does so even though it is not subject to the Jones Act and even though the state possesses greater latitude than possessed by the western states, as described in this brief, in the management of school lands under Minnesota's enabling act 11 Stat. 166, 167, ch. 31, sec. 5 (Act of Feb. 26, 1857) and other applicable federal acts, the Minnesota Constitution, and related decisions of federal and state courts, such as *Essling v. Brubacher*, 55 F.R.D. 360 (1971), *aff'd.*, No. 72-1034 (8th Cir. June 8, 1972), *cert. denied*, 409 U.S. 950 (1972); *State of Minnesota v. Evans*, 99 Minn. 220, 108 N.W. 958 (1906); and *Lawyer v. Great Northern Ry. Co.*, 127 N.W. 431 (Minn. 1910). For these reasons Minnesota concurs with the conclusions of the other amici to the extent that school land grant states do not possess unfettered authority to dispose of mineral bearing school lands.

The Wyoming Constitution directs that state's Board of Land Commissioners to "realize the largest possible proceeds" from the disposition of school trust lands. Wyo. Const. Art. XVIII, secs. 1,3. The applicable statute requires royalties to be set on oil and gas at a minimum rate of five per cent on all oil and gas produced and saved from and not used in operations on leased lands. W.S. 36-6-101(a). The State's rules and regulations set a minimum rate of 16 and two-thirds per cent unless a different rate is set by the Board. Rules and Regulations Governing Leasing of Subsurface Resources (March 1, 1982).

The State of Oregon has also incorporated its trust responsibilities in the language of its Constitution. Although the Oregon Admissions Act merely states that the numbered sections are granted "for the use of the schools," 11 Stat. 383 sec. 4 (1859), the Oregon Constitution requires the State Land Board to manage trust lands "with the object of obtaining the greatest benefit for the people of the State, consistent with the conservation of this resource under sound techniques of land management." Or. Const. Art. VIII sec. 5. The Oregon Legislature has directed the Division of State Lands to negotiate royalties to fulfill those trust purposes. O.R.S. sec. 273.551 (1).

Finally, the State of California, another Jones Act state, leases its oil and gas resources to the highest responsible bidder upon competitive bidding. Calif. Pub. Res. Code sec. 6815.1.

A decision from this Court rejecting as a matter of federal law the Arizona Supreme Court's application of

these widely accepted trust values and responsibilities to Arizona's school trust lands of mineral character would provide grounds for questioning the law of other states that have made full and sincere efforts to uphold their trust responsibilities to seek the long-term maximization of the incomes of state public school and university systems.

CONCLUSION

The issue before this Court is relatively simple: Should the language of the Jones Act authorizing legislatures to determine the manner in which mineral-bearing school lands are leased be construed as to give them unfettered authority to give away trust assets? If petitioners' arguments are adopted, legislatures could just as easily set a one cent royalty as a \$5 one. And the entire meaning and purpose of the school lands trust would be abrogated.

However this is not the case. The language of the Jones Act does not represent a turnaround in the consistent purpose of Congress that the beneficiary schools of the public land states receive the "full benefit" of the grant. *Lassen v. Arizona*, *supra*, 385 U.S. 458, 468. Rather, as the Court of Appeals for the Tenth Circuit characterized it: "(t)he manifest and predominating purpose of Congress was that the lands were to be disposed of in a manner that would bring the greatest returns to the beneficiary of the grant. That, of course, is always the duty of a trustee. The state took the land in trust to that end." *Terry v.*

Midwest Refining Co., 64 F.2d 428, 434 (10th Cir.), cert. den., 290 U.S. 660 (1933).

Respectfully Submitted,

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(6) Supreme Court, U.S.

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No. 87-1661

UNITED STATES SUPREME COURT

October Term, 1988

ASARCO INCORPORATED, CAN-AM
CORPORATION, MAGMA COPPER
COMPANY and JAMES P.L. SULLIVAN,
Petitioners,

v.

FRANK and LORAIN KADISH, et al.,
Respondents.

BRIEF OF THE STATE OF
ARIZONA, AMICUS CURIAE

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INTEREST OF AMICUS

The State of Arizona has a strong interest in this case because it not only involves the interpretation of its laws, but also the interpretation of its laws by its own Supreme Court based on the state constitution. Here, the federal Enabling Act question is subordinate to the State's own constitutional provisions governing the leasing of state lands and minerals. Accordingly, any decision as to the applicability of the Enabling Act's requirement of appraisal is purely academic and would not alter the outcome of this case.

IN ANY EVENT, THE ARIZONA MINERAL
ROYALTY STATUTE WOULD BE INVALID UNDER
ARTICLE X OF THE ARIZONA CONSTITUTION

The case here was decided by the Arizona Supreme Court based on the Enabling Act as well as the state constitution:

We hold, therefore, that A.R.S. § 27-234 violates art. 10 of the Arizona Constitution and § 28 of the Enabling Act.

155 Ariz. 484, 497, 747 P.2d 1183, 1196 (1987).

While the Arizona Supreme Court's interpretation of the Enabling Act is surely reviewable in this Court, as a practical matter review by this Court would not change the outcome based on Article X of the state constitution.

Article X, § 1 of the Arizona constitution subjects all grant lands and "all lands otherwise acquired by the State" to the constitutional restrictions. Mineral lands which came to the State's ownership under the Jones Act clearly are "lands otherwise acquired by the State"

and therefore are subject to Art. X's restrictions.

All state lands are "held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided" (Art. X, § 1) (emphasis added). Article X, § 1 also provides that the "natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same."

It is therefore plain that, under Arizona's constitutional scheme, the mineral lands and minerals are subject to the trust imposed by the state constitution.

Article X, § 3 of the Arizona Constitution requires that "lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction" and that sales of the natural products of such lands shall be made "in the manner . . . provided for sales and leases of the lands themselves." Ar-

ticle X, § 4 provides that "lease-holds, timber, and other products of land, before being offered, shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained . . ."

Arizona's constitutional scheme as to true value/public auction applies fully to Jones Act mineral lands. Absent any overriding congressional legislation, Arizona can validly subject those lands to the State's constitutional protections.

The Arizona Supreme Court held very recently:

The Enabling Act, as interpreted in Lassen [Lassen v. Arizona, 385 U.S. 458 (1967)], merely sets out the minimum protection for our state trust land. We independently conclude that our state constitution does much more.

Deer Valley Unified School Dist. No. 97 v. Superior Court, ___ Ariz. at ___, ___ P.2d at ___ (filed June 30, 1988).

The Deer Valley decision is fully consonant with long-established precedent of this Court. See Haire v. Rice, 204

U.S. 291, 27 S.Ct. 281 (1907), affirming
State v. Rice, 33 Mont. 365, 83 P. 874
(1906) (Montana's constitutional provision
as to the use of trust proceeds governs
over the provision of the Enabling Act).

Logically, under Deer Valley, re-
gardless of whether the Jones Act mineral
lands are subject to the restrictions of
§ 28 of the Enabling Act, the true value/
public auction imposed by Art. X of the
Arizona Constitution would apply and any
decision by this Court would be purely
academic.

CONCLUSION

The petition should be dismissed for
the lack of a substantial federal question.

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